No. 99-6615-CFH Title: Michael Wayne Williams, Petitioner
v.
CAPITAL CASE John Taylor, Warden

Docketed: October 18, 1999 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Oct 18 1999	Application (99A307) for a stay of execution, submitted to The Chief Justice.
	Oct 18 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 17, 1999)
	Oct 21 1999	Brief of respondent John B. Taylor, Warden in opposition filed.
	Oct 26 1999	Reply brief of petitioner filed.
	Oct 26 1999	Supplemental brief of respondent John B. Taylor, Warden filed.
	Oct 28 1999	Application (99A307) referred to the Court by the Chief Justice.
	Oct 28 1999	Application (99A307) granted by the Court.
	Oct 28 1999	Petition GRANTED. The petition for writ of certiorari is granted limited to Question 2 presented by the petition. SET FOR ARGUMENT February 28, 2000.
		**********
	Nov 8 1999	Motion of petitioner for appointment of counsel filed.
	Nov 17 1999	DISTRIBUTED. December 3, 1999 (page 4)
	Nov 23 1999	Order extending time to file brief of petitioner on the merits until December 23, 1999.
	Nov 23 1999	Joint appendix in three volumes.
	Nov 23 1999	Joint appendix filed.
	Dec 6 1999	Motion for appointment of counsel GRANTED and it is ordered that Barbara L. Hartung, Esq., of Richmond, Virginia, is appointed to serve as counsel for the petitioner in this case.
	Dec 8 1999	Order extending time to file respondent's brief on the merits to and including January 31, 2000.
	Dec 15 1999	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
	Dec 20 1999	Record filed.
	Dec 23 1999	Brief of petitioner Michael Wayne Williams filed.
	Dec 23 1999	Motion of Legal Ethics Professors, et al. for leave to file a brief as amici curiae filed.
	Dec 23 1999	Motion of Virginia College of Criminal Defense Attorneys, et al. for leave to file a brief as amici curiae filed.
	Dec 28 1999	Record filed.
	Jan 7 2000	CIRCULATED.
	Jan 18 2000	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 18 2000	Motion of Legal Ethics Professors, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 18 2000	Motion of Virginia College of Criminal Defense Attorneys, et al. for leave to file a brief as amici

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No. 99-6615-CFH

Entry	Date	Proceedings and Orders
		curiae GRANTED.
	Jan 31 2000	Brief of respondent John B. Taylor, Warden filed.
	Jan 31 2000	Brief amici curiae of California, et al. filed.
	Feb 18 2000	Reply brief of petitioner Michael Wayne Williams filed.
	Feb 28 2000	ARGUED.

(2)

No. 99-6615

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

Supreme Court, U.S.
FILED
OCT 1 1999
OFFICE OF THE CLERK

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Imminent Execution Scheduled
October 28, 1999

Pursuant to Rule 39 of the Rules of the Supreme Court of the United States, Michael Wayne Williams, by counsel, hereby asks leave to proceed in forma pauperis. Petitioner sought and was granted leave to proceed in forma pauperis in all prior proceedings in both state and federal courts. He had assigned counsel at every stage of his capital proceedings. Undersigned counsel was appointed pursuant to 21 U.S.C. sec. 848 in prior federal court proceedings. Mr. Williams' Affidavit in support is attached.

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SUPREME COURT, U.S.

51pp

Mr. Williams is currently incarcerated at Sussex I State Prison, 24414 Musselwhite Drive, Waverly, Virginia, in the custody of the Respondent.

Respectfully submitted,

James E. Moore

Barbara L. Hartung

Christian & Barton, L.L.P.
Suite 1200
909 East Main Street
Richmond, Virginia 23219
(804) 697-4100

(Counsel of Record)
1001 East Main Street
Suite 504
Richmond, Virginia 23219
(804) 649-1088

Counsel for Petitioner

October 16, 1999

IN THE SUPREME COURT OF THE UNITED STATES

IN FORMA PAUPERIS AFFIDAVIT

I, MICHAEL WAYNE WILLIAMS, being first duly sworn according to law, depose and say that I am the petitioner in this proceeding; that in support of my motion to proceed without being required to prepay fees, costs, or security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the following relating to my ability to pay the costs in this Court are true:

1. I am presently incarcerated in Sussex I State Prison, Waverly, Virginia, and am not employed;

2. In the past six months, I have not received any income from a business, profession, or any other source, except $20.00/month from the prison; and my mom will send me a few dollars for soap and stuff

3. My cash assets are $27.45;

4. I own no stocks, bonds, automobiles, real estate, or other valuable property.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Michael Williams
MICHAEL WAYNE WILLIAMS
Inmate No. 165709

Sworn to before me this 20th day of September, 1999:

Notary Public

My commission expires on: 31 OCT 2003

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No. 97-6615

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison,
Waverly, Virginia,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Date:
October 28, 1999

Supreme Court, U.S.
FILED
OCT 1 1999
OFFICE OF THE CLERK

Barbara L. Hartung
(Counsel of Record)
Suite 504
1001 East Main Street
Richmond, VA 23219
(804) 649-1088

James E. Moore
Christian & Barton, L.L.P.
Suite 1200
909 East Main Street
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a prosecutor violates a criminal defendant's Sixth Amendment right to confront the witnesses against him when the prosecutor impeaches a testifying defendant based on his mere presence throughout the trial, and, if so, whether this is a new rule under Teague v. Lane, 489 U.S. 288 (1989).

2. Whether 28 U.S.C. sec. 2254(e)(2), which prohibits a federal habeas court from holding an evidentiary hearing only "if the applicant has failed to develop the factual basis of a claim in State Court proceedings," governs petitioner's claims where throughout state proceedings, the state suppressed the relevant facts, denied petitioner's discovery requests, denied all investigative and expert resources to investigate, develop, and discover claims, and denied an evidentiary hearing.

3. Whether a petitioner seeking expert assistance under revised 21 U.S.C. sec. 848(q)(9), who moves to proceed ex parte and asserts a need for confidentiality, must first demonstrate his need for confidentiality at an adversarial hearing before opposing counsel.

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PETITION FOR A WRIT OF CERTIORARI

Michael Wayne Williams, a Virginia death sentenced inmate, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the district court's denial of his petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the court of appeals is reported at Williams v. Taylor, __ F.3d __, No. 99-1 (4th Cir. 1999), and is reprinted in the Appendix (A 2). The opinion of the district court dismissing the petition is reported at 6 F. Supp.2d 545 (E.D. Va. 1998) and appears at A 9. The order of the court of appeals granting an emergency stay of an evidentiary hearing, In Re: Greene, No. 98-17 (4th Cir. 5/27/98), is unreported and appears at A 20. The initial opinion of the district court granting an evidentiary hearing on claims of juror and prosecutorial misconduct is unreported and appears at A 23. The Virginia Supreme Court's opinion on direct review is reported at Williams v. Commonwealth, 450 S.E.2d 365 (Va. 1994), and appears at A 126. The Virginia Supreme Court's order dismissing the state habeas petition appears at A 123.

JURISDICTION

The court of appeals issued its judgment and decision on August 2, 1999. Williams filed a timely petition for rehearing and suggestion for rehearing en banc. The court denied the petition on August 27, 1999. A-1. This Court has jurisdiction pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution in

pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial by an impartial jury * * * [and] to be confronted with the witnesses against him * * *."

This case also involves 28 U.S.C. sec. 2254(e)(2), reprinted at A 155, and 21 U.S.C. sec. 848(q)(9), reprinted at A 154.

STATEMENT OF THE CASE

The Crime And The Trial

On February 27, 1992, Morris Keller, Jr., and his wife, Mary Keller were shot several times in a wooded area behind their home in Cumberland County, Virginia. Their house had been robbed and burned. Based on statements from Jeffrey Cruse, who admitted raping and murdering Mrs. Keller, the police arrested petitioner, Michael Williams[1]. Cruse became a witness for the state.

Both Williams and Cruse testified at Williams' trial. Each maintained that he had fired a single shot (Williams at Mr. Keller and Cruse at Mrs. Keller) and that the other defendant had fired the remaining seven shots at the Kellers. Both Williams and Cruse agreed that Williams fired once at Mr. Keller while facing Mr. Keller. Mr. Keller fell to the ground, but then Mr. Keller stood

[1] Williams and Cruse were charged in separate indictments with the same offenses: capital murder, robbery, rape, and abduction of Mary Keller; capital murder, robbery, and abduction of Morris Keller; capital murder based on two related homicides; statutory burglary, and arson. "JA" refers to the Joint Appendix filed with the Fourth Circuit Court of Appeals.

up. JA 115-116. In view of Virginia's triggerman rule[2], the jury had to determine who killed the Kellers -- Williams or Cruse. As the state's forensic evidence did not settle this question, the verdict on three capital murder counts and two death sentences, turned on the relative credibility of Williams and Cruse.

Cruse testified first. He stated that Williams decided to commit a robbery and selected the Kellers' home. Cruse had a .357 revolver before he and Williams entered the house. Williams and Cruse forced their way into the home after asking to use the phone, and Williams dictated all their actions once inside. JA 89-91, 97, 104, 109. Searching the house, Cruse found a loaded .38 revolver and .38 bullets. During that evening, Cruse and Williams switched possession of the guns several times. When Williams told Cruse to take the Kellers into the woods, Cruse was unaware of any plan to kill the couple until moments before the first shots were fired. Cruse admitted shooting Mrs. Keller once with the .357. JA 117. Forensic experts confirmed that Mrs. Keller was shot three times in the face by two different guns. Both a .357 Ruger and a .38 Smith

[2] Under the "triggerman" rule, only the actual perpetrator of the crime (except in the case of murder for hire) may be convicted of capital murder and be eligible for execution. See Frye v. Commonwealth, 345 S.E.2d 267, 280 (Va. 1986)(victim killed by gunshot); Cheng v. Commonwealth, 393 S.E.2d 599, 607-608 (Va. 1990)(same). Where one or more persons were involved, they must have jointly participated in inflicting the fatal wounds to be liable for capital murder. Coppola v. Commonwealth, 257 S.E.2d 797, 806-807 (Va. 1979)(victim killed by beating); Strickler v. Commonwealth, 404 S.E.2d 227 (Va. 1991)(same). "One who is present, aiding and abetting the actual murder, but who does not actually fire the fatal shot, is a principal in the second degree and may be convicted of no greater offense than first degree murder." Frye at 280. See Va. Code sec. 18.2-31.

& Wesson had been used.

Cruse had been indicted on three counts of capital murder and was eligible for the death penalty if convicted. On direct and redirect, Cruse stated he had no agreement with the Commonwealth about his sentence or any benefits in exchange for his testimony. JA 152, 178. However, when the lead prosecutor asked, "Is it your understanding that the Judge[3] is going to decide whether you live or die?" Cruse responded "Correct." JA 178. On summation, the lead prosecutor argued that Cruse was credible because "[H]e sits here today facing the death penalty . . . his back is against the wall; if he lies, he dies[.]" A 153.

In exchange for Cruse's testimony against Williams, the state originally agreed not to seek the death penalty. On cross, Cruse admitted that he had given a series of false statements at the preliminary hearing. JA 172-73, 163-66. When Cruse failed to admit that he had raped Mrs. Keller, his agreement was withdrawn once forensic proof of the rape was obtained. JA 170.

Williams was the last witness to testify, and he contradicted Cruse's account. Cruse had "actively participated" in the decision to commit the robbery and had not meekly followed Williams that night. Cruse, not Williams, had suggested murdering the Kellers to eliminate them as witnesses. JA 248-49, 255-56. While Williams admitted his part in the robbery, burning the Kellers' house, and

[3] Under Virginia law, when a defendant enters a plea, the judge alone determines the sentence. At a capital trial, the jury imposes sentence, and the judge cannot impose death if the jury has not recommended a death sentence. Va. Code sec. 19.2-264.5.

firing the first, nonfatal shot at Mr. Keller, Williams denied raping Mrs. Keller.[4] JA 252-57, 269. Williams stated he had fired only one shot that night using the .38.

Williams' defense to capital murder was that the one shot he fired at Mr. Keller was not fatal. Mr. Keller had been shot twice in the right leg and three times in the head. The medical examiner testified that one of the bullets went through the facial bones and was not necessarily fatal. JA 195, 196. Williams maintained that the fatal shots to both Mr. and Mrs. Keller were fired by Cruse.

On cross-examination, the prosecutor attacked Williams' credibility by stressing that he had exercised his right to be present during the testimony of the other witnesses. The prosecutor's first two questions were, "Do you know what a Motion to Exclude Witnesses is," and "Have you been watching this trial as we've been going along here?" A 147. After establishing that Cruse and the other prosecution witnesses did not have a chance to hear the testimony of any other witness, the prosecutor then asked:

> You're the only witness who has sat in here through this trial and heard the testimony of every witness before you got to testify, isn't that correct?

A 148. When Williams' counsel objected that Williams was merely exercising his constitutional right to confront his accusers, the trial judge overruled the objection and permitted the question to stand. A 149. Near the end of his cross-examination, the

[4] Forensic tests eliminated Mr. Keller as a semen donor and determined that if there was only one donor, it was Cruse. R. 1112, 1115. If there were two donors, the results were consistent with both Williams and Cruse as donors. R. 1113. ("R." refers to the record on direct appeal.)

prosecutor asked Williams whether, "as a convicted felon who has heard all the testimony of all the witnesses in here," he had testified truthfully. A 274.

The prosecutor returned to this theme in his summation. He argued that Williams was not as credible a witness as Cruse because Williams had exercised his right under the Sixth Amendment to be present at trial and confront the witnesses against him[5]. On rebuttal, the prosecutor argued that Cruse was charged with two counts of capital murder and was facing the death penalty: "And like he told you right now, his back is against the wall; if he lies, he dies, and that is his situation." A 153 (emphasis added).

At the conclusion of the guilt phase, Williams was convicted on all counts. At the sentencing phase, the jury found both vileness and future dangerousness and sentenced Williams to death. On February 22, 1994, the trial judge imposed two death sentences.

A trial date was never set for Cruse. Two months after Williams' conviction, Cruse pled guilty to the capital murder of Mrs. Keller and to the reduced charge of first degree murder of Mr. Keller. At the sentencing hearing, the prosecutor urged the Court to spare Cruse's life based on his cooperation against Williams. Cruse received a life sentence on April 26, 1994. JA 1670.

---

[5] "Williams sat right here -- and he's got a right to do it -- and he listened to everybody. Mr. Cruse didn't have that right to sit here and listen to everybody. He came in and told you as it was and it was corroborated right down the line on everything he said. You heard witnesses, honest witnesses, believable witnesses, that showed you that Mr. Cruse is believable. He's telling it like it is. And Mr. Williams had his right to sit in here and listen to everything that happened." A 151.

The Direct Appeal

On appeal to the Virginia Supreme Court, Williams argued, inter alia, that the prosecutor violated his right of confrontation by commenting upon his exercise of that right during cross-examination. The Virginia Supreme Court summarily rejected that argument. The court stated that it "fail[ed] to see how those rights are violated by a question that reflected what the jury already knew." A. 136.

The State Habeas Corpus Proceedings

Williams' appointed state habeas counsel made numerous and varied efforts to discover claims and develop evidence supporting them. He filed an extensive request for any Brady materials held by the Commonwealth. JA 376. He specifically requested all psychiatric reports of any witness that could affect the witness' credibility. JA 379. He asked to examine the investigative files of the relevant sheriff's office. JA 374-75. As Cruse was incarcerated at an unknown location out of state, habeas counsel sought disclosure of that location so he could interview Cruse. JA 389. All requests were refused. State habeas counsel then filed a motion with the Virginia Supreme Court seeking production of Cruse for an interview and production of all documentation relating to Cruse's incarceration. JA 398. State habeas counsel moved for the appointment of investigators and forensic experts to examine issues relating to the shooting and Cruse's testimony. JA 385. He also moved for the appointment of a jury investigator to examine "irregularities, improprieties and omissions" in the empaneling of

the jury. JA 386. The state vigorously opposed all motions, and the Virginia Supreme Court denied each one. A 123.

In his state habeas petition, Williams alleged that Cruse had an undisclosed understanding or agreement with the state: if he testified against Williams, the state would not seek the death penalty. Under Brady v. Maryland, 373 U.S. 83 (1963), the state was required to disclose any agreement. The state responded with an affidavit from Cruse's attorney and an affidavit from one of the two prosecutors denying that any agreement existed. However, the lead prosecutor who presented Cruse's testimony at trial and who told the jury "if he lies, he dies," never submitted an affidavit nor did Cruse. The state court dismissed the claim as "without merit," giving no factual or legal grounds for its action. JA 502.

The Federal District Court Proceedings

A. In federal habeas, Williams renewed his claim that the prosecutor violated his Sixth Amendment right of confrontation by impeaching him with his exercise of that right. He argued that this Court's decisions in Griffin v. California, 380 U.S. 609 (1965) (Fifth Amendment prohibits comment on defendant's failure to take the witness stand) and Brooks v. Tennessee, 406 U.S. 605 (1972) (requirement that defendant testify first for defense or not at all violates Fifth Amendment) prohibited impeachment based on his mere presence throughout the trial testimony and proceedings.

While expressing serious concern about the "propriety" of the prosecutor's comments, the district court held that prior decisions of this Court did not "dictate" a finding that the prosecutor

violated Williams' rights. The district court also held that such a result would violate Teague v. Lane, 489 U.S. 288 (1989). A 63. However, citing Griffin, the district court found the state court's justification for dismissing the claim "erroneous and unpersuasive." A 64.

B. Williams renewed his claim that the state had failed to disclose a sentence agreement with Cruse in violation of Brady and the Sixth Amendment. The district court found that "Cruse played a critical role in the Commonwealth's case against Williams," that without Cruse's testimony "the physical evidence could not establish who fired the fatal shots," and that "Williams' conviction [of capital murder] clearly hinged on the credibility [of Cruse]." As the state court had "provided no insight as to the manner or reason by which it made its factual or legal determinations," the district court granted Williams an evidentiary hearing on the sentence agreement claim. A 76, 77-78.

C. Williams raised a new Brady claim in federal habeas based on the state's failure to disclose a pretrial, confidential, psychiatric report on Cruse. The report stated:

> "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time." (JA 865.)

In view of Cruse's detailed trial testimony, the district court held that the undisclosed psychiatric report was Brady material. It impeached Cruse's testimony, and Williams suffered obvious prejudice from the state's failure to disclose the report. A 54. However, the district court held Williams had failed to

demonstrate cause for his failure to raise this claim in state court. A 55. Although state habeas counsel, White, had reviewed Cruse's state court file, he did not find the report therein. See White Affid., JA 1500. The Cruse report was discovered in the court files by federal habeas counsel's investigator. JA 1459-60. Given its sensitive nature, the report clearly had been improperly placed in a public file. See Va. Code sec. 53.1-40.10. Without holding a hearing to determine when the report reached the public file or to assess the credibility of key witnesses before deciding if Williams had established cause for default, the district court simply dismissed the claim.

D. Based on the facts set forth below, Williams presented two new claims in federal habeas arising from juror and prosecutorial misconduct during voir dire. He alleged violations of his Sixth Amendment right to an impartial jury and right to a fair trial.

During his federal habeas investigation, Williams learned that Bonnie Stinnett, the jury forewoman, failed to reveal that Deputy Sheriff Claude B. Meinhard, was her ex-husband and the father of her four children. Meinhard testified about his investigation of the Keller homicides and was one of the officers who interviewed Cruse. Stinnett also failed to reveal that one of the prosecutors, Woodson, had been her divorce attorney[6]. A 143, 146. Despite

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[6] The trial court asked these questions (A 143, 146):

Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?

Are any of you involved in law enforcement?

several opportunities to reveal her relationship to Meinhard and Woodson, Stinnett remained silent. In federal habeas, Stinnett submitted an affidavit stating that she had spoken to Meinhard "only one or two times a year" since the divorce in 1979. JA 1425a. As Stinnett had custody of their four, minor children and Meinhard visitation rights, this affidavit was not credible.

The prosecutor, Woodson, never elicited Stinnett's relationship to Meinhard during voir dire, never advised the court or defense counsel of that relationship, and never revealed his involvement in their divorce. In federal habeas, Woodson submitted an affidavit stating that he knew during jury selection that Stinnett was Meinhard's ex-wife, he did not bring this fact to the attention of the court or the defense, and he had represented "one or both" parties in their divorce although he denied any independent recollection of this. JA 1425c-d.

The district court held that Williams had demonstrated cause and prejudice to overcome any procedural bar to review of these claims. A 52. The district court granted an evidentiary hearing on claims of juror and prosecutorial misconduct.

E. While preparing his federal habeas petition, Williams moved ex parte under 28 U.S.C. sec. 848(q)(9) for appointment of forensic

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Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard[.]

Although the Keller murders were highly publicized in the small community where the trial occurred, Stinnett, a high school teacher, denied ever hearing or reading any news stories or reports about Williams or the case. A 145.

experts and an investigator to assist in developing his federal claims. The district court initially granted Williams' applications based on motions detailing the required services and found the services "reasonably necessary." A 121-122. This authorization was withdrawn when the state moved for an adversarial hearing on the need for confidentiality. Williams insisted that his need for confidentiality could only be demonstrated ex parte and refused to make any public disclosures. A 119-120. Williams argued that the only reasonable construction of the statute consistent with its purpose required the district court to assess the need for confidentiality ex parte while maintaining a transcript for review. The statute does not mention or require an adversarial hearing. The district court held that the need for confidentiality must be demonstrated at a hearing and revoked the grant of assistance. Williams' renewed application for services after filing his initial petition was also denied.

The Fourth Circuit's Stay And The Decision On Remand

On the state's motion, the Fourth Circuit granted an emergency stay of the evidentiary hearing on the three claims of juror and prosecutorial misconduct. The Fourth Circuit directed the district court to apply the restrictive provisions of 28 U.S.C. sec. 2254(e)(2)(A) and (B) to Williams' claims (A 21):

> [The Antiterrorism and Effective Death Penalty Act] establishes certain limits on a court's ability to conduct an evidentiary hearing where an applicant has failed to develop the factual basis of a claim in state court. In such cases, the court may hold an evidentiary hearing only if the claim satisfies two requirements. First, the claim must rely on either certain retroactive new rules of constitutional law or a "factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. sec. 2254(e)(2)(A). Second, the underlying facts must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Id. sec. 2254(e)(2)(B).

Williams argued that sec. 2254(e)(2) did not apply to his case at all because the statute's condition precedent had not been satisfied, i.e., Williams had not "failed to develop" his claims. He had made diligent efforts in state court but was denied discovery, expert resources to develop and discover claims, and a hearing. On remand, the district court agreed in part and held that Williams had tried to develop his claims in state court but had been blocked repeatedly by the state. A 16. The district court concluded, however, that "this Court has been directed . . . to apply section 2254(e)(2)[.]" The district court concluded that a hearing was prohibited and dismissed the claims. A 18-19.

The Fourth Circuit's Decision On Appeal

A. Williams raised his Sixth Amendment claim that the prosecutor improperly impeached him based on his presence throughout the trial. The Fourth Circuit did not reach the substantive issue[7]. The Court described Williams' inculpatory testimony as "devastating" and held that any error was harmless, citing Brecht v. Abrahamson, 507 U.S. 619 (1993). A 7. The Court affirmed the district court's decision that holding the prosecutor's remarks to be a Sixth Amendment violation would create a new rule. Ibid.

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[7] The Court noted the grant of certiorari on this issue in Portuondo v. Agard, 119 S. Ct. 1248 (1999) (argument set for Nov. 1, 1999),

B. Williams appealed the denial of a hearing under 2254(e)(2) on his claim alleging an undisclosed plea agreement with Cruse. In its decision the Fourth Circuit erroneously stated the district court's opinion. The Fourth Circuit held that the district court "properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's determination in view of the unrefuted evidence." A 6. The Court also held that even if Cruse had an undisclosed agreement in violation of Brady, Williams could not show materiality--a reasonable probability of a different result--given his admitted participation in the crimes. Relying on sec. 2254(d)(1) and Green v. French, 143 F.3d 865, 870 (4th Cir. 1998)[8], the Fourth Circuit held that the state court's denial of the plea agreement claim was "minimally consistent" with controlling precedent. A 6.

C. Addressing Williams' Brady claim arising from Cruse's undisclosed psychiatric report, the Fourth Circuit affirmed the district court's dismissal but on slightly different grounds. Relying on 28 U.S.C. sec. 2254(e)(2)(A)(ii), the court concluded that the discovery of Cruse's report during federal habeas in the same file that state habeas counsel had reviewed demonstrated that "[state habeas] counsel did not act diligently." A-5. The Fourth Circuit ignored Williams' repeated requests for this very information in state court and the state's failure to disclose the report. The Fourth Circuit also held that Williams could not

[8] This Court granted certiorari in Williams v. Taylor, 119 S. Ct. 1353 (1999)(argued Oct. 4, 1999), to review the Fourth Circuit's interpretation of sec. 2254(d)(1) set forth in Green.

demonstrate innocence under sec. 2254(e)(2)(B).

D. The Fourth Circuit rejected Williams' argument that sec. 2254(e)(2) did not apply to his Sixth Amendment claims arising from the jury selection. Williams' had not been diligent in developing those claims in state court. Stinnett's divorce had been a matter of public record since 1979, and federal habeas counsel located those documents. These facts demonstrated that state habeas counsel could have done so as well. Williams' general request for a jury investigator in state habeas had been insufficient to state a specific claim[9]. Therefore, the failure to develop the record must be attributed to Williams, not to the state. A 4. The Fourth Circuit also held that Williams could not demonstrate his innocence under 2254(e)(2)(B) since he had admitted shooting once at Mr. Keller. Id. A federal evidentiary hearing was prohibited.

E. The Fourth Circuit affirmed the district court's construction of 21 U.S.C. sec. 848(q)(9). A "petitioner must demonstrate his need for confidentiality at an [adversarial] hearing" before the state's counsel. The application cannot be made ex parte. A 8.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE WHETHER A PROSECUTOR VIOLATES A TESTIFYING DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES BY IMPEACHING HIM WITH HIS PRESENCE AT TRIAL AND, IF SO, WHETHER THIS CONSTITUTES A NEW RULE UNDER TEAGUE v. LANE, 489 U.S. 288 (1989)

The first issue in this case presents a conflict among the

[9] After the district court denied all investigative and expert assistance, Williams' federal habeas counsel retained an investigator to assist in federal court. State habeas counsel lacked the means to do so when the state court denied assistance.

Second Circuit Court of Appeals, the Fourth Circuit Court of Appeals, and the Virginia Supreme Court concerning the constitutionality of a prosecutor's comments on a testifying defendant's exercise of his right to confront witnesses, and whether such impeachment can be harmless where credibility is the sole issue for the jury. The Fourth Circuit also held that if such comment violates the Sixth Amendment, it constitutes a "new rule" under Teague v. Lane, 489 U.S. 288 (1989).

A. The Sixth Amendment guarantees to all state and federal criminal defendants the right to confront the prosecution's witnesses. Pointer v. Texas, 380 U.S. 400, 403 (1965). The Sixth Amendment also guarantees the defendant a right to be present at all stages of the trial. Illinois v. Allen, 397 U.S. 337, 338 (1970). Recognizing the importance of the issue presented, this Court granted the state's petition for certiorari in Portuondo v. Agard, 119 S. Ct. 1248 (1999), which posed this question:

> Whether the Second Circuit Court of Appeals erred in extending this Court's decision in Griffin v. California, 380 U.S. 609 (1965) -- which prohibited a prosecutor's comment on a defendant's right to remain silent -- to a prosecutor's comments on a testifying defendant's presence in the courtroom during the testimony of other witnesses.

The prosecutor in Agard argued that the defendant was less credible than the prosecution witnesses because he attended the entire trial while the witnesses were present only during their own testimony. This was a generic argument and was not based on the defendant's testimony concerning any particular facts. The prosecutor stated:

> You know, ladies and gentlemen, unlike all the other witnesses. . . the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> [objection overruled]
>
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
>
> [objection overruled]
>
> He's a smart man. I never said he was stupid . . . He used everything to his advantage.

Agard v. Portuondo, 117 F.3d 696, 707 (2d Cir. 1997), aff'd on rehearing, 159 F.3d 98 (2d Cir. 1998).

The Second Circuit held that the prosecutor's summation remarks violated Agard's "right to confrontation, right to testify on his own behalf, and his right to receive due process and a fair trial." Id. at 709. The prosecutor's remarks were harmful where the issue for the jury and the verdict turned on the credibility of the defendant and the victim. 117 F.3d at 714; 159 F.3d at 99.

The Second Circuit based its holding on this Court's decision in Griffin v. California, 380 U.S. 609 (1965), that addressed a prosecutor's (and then a trial judge's) comments on a defendant's refusal to testify. Noting that the defendant was present at several key events relating to the charged offense, both the prosecutor and the trial judge instructed the jury to infer that the defendant would have testified had he had any exculpatory evidence to offer. See 380 U.S. at 610-12. Although the jury was obviously aware that the defendant did not testify, this Court reversed. The prosecutor's comments, this Court found, were "a penalty imposed . . . for exercising a constitutional privilege" that "cut[] down on the privilege [against self-incrimination] by

making the assertion costly." Id. at 614.

In reaching this conclusion, the Griffin Court rejected the state's suggestion that the adverse inference the prosecutor urged the jury to draw from the defendant's refusal to testify was "natural and irresistible." Id. First, this Court found that such an inference was neither natural or irresistible: even a defendant with exculpatory evidence to give might refuse to testify out of "fear that his prior convictions will prejudice the jury." Id. at 615 (quotation omitted). Second, this Court found that even if an adverse inference were warranted, the comment by the prosecutor or the judge would be improper:

> What a jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id. at 614. Accordingly, the Court held that the comments of the prosecutor and the trial judge constituted reversible error. See id. at 615.

Citing Griffin, this Court in Brooks v. Tennessee, 406 U.S. 605 (1972), held that the state may not require the defendant to testify prior to any other defense witnesses:

> [A] defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed. Yet under the Tennessee rule, he cannot make that choice "in the unfettered exercise of his own will." Section 40-2403 exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first [footnote omitted]. This we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the stand [footnote omitted]. The rule, in other words, "cuts down on the privilege [to remain silent] by making its

assertions costly."

Id. at 610-11 (citing Griffin, 380 U.S. at 614 (1965)).

B. The combined holdings in Griffin and Brooks prohibited the impeachment conducted in petitioner's case. The prosecutor began his cross-examination of petitioner with a series of twelve questions demonstrating that petitioner had been present throughout the trial and heard the testimony of each and every witness, although the witnesses had not. A 147-148. These initial questions were generic in nature. They were not tied to any specific instance of alleged fabrication responsive to the testimony of other trial witnesses. The prosecutor sought to demonstrate that petitioner was not as credible as the prosecution's principal witness simply because petitioner had been present for and heard the testimony of each witness. JA 303-04.

As in Agard, the capital verdicts and petitioner's death sentence depended solely on the jury's assessment of the credibility of the two witnesses -- petitioner and the cooperating co-defendant, Cruse. Absent the improper comments of the prosecutor, the jury may well have concluded that Cruse, not petitioner, was responsible for the murders.

In contrast to the Second Circuit, the Virginia Supreme Court on appeal found no constitutional violation where the offending questions on cross examination only "reflected what the jury already knew." Williams v. Commonwealth, 450 S.E.2d 365, 375 (Va. 1994). A 136. The state court cited no legal authority in support of its opinion. As this very reasoning was explicitly rejected by

this Court in Griffin, the state court demonstrated an erroneous understanding of clearly established constitutional principles.

The rationale adopted by the state court is flatly inconsistent with this Court's decisions under the Fifth Amendment and merits no deference under 28 U.S.C. sec. 2254(d)(1). The state court found that the prosecutor's comments did not violate petitioner's constitutional rights because those comments "reflected what the jury already knew." This Court has never endorsed such a rationale. To the contrary, this Court has repeatedly held that, where a defendant exercises a constitutional right at trial, prosecutorial comment on the exercise of that right is impermissible. See, e.g., Anderson v. Nelson, 390 U.S. 523, 525 (1968) (per curiam)(comment on refusal to testify); Griffin v. California, supra (same); Johnson v. United States, 318 U.S. 189, 196-97 (1943) (comment on invocation of privilege against self-incrimination). A more basic constitutional principle can hardly be imagined.

As in Griffin, the prosecutor's comments in petitioner's case imposed a penalty on petitioner for exercising his right of confrontation, thereby "cutting down on the privilege by making its assertion costly." Similarly, as in Griffin, the mere fact that the jury knew the petitioner had exercised his right to confront the witnesses against him did not give the prosecutor license to "solemnize" the defendant's attendance at trial "into evidence against him." Like the defendant in Griffin, petitioner had a legitimate reason to exercise his constitutional right to confront

the witnesses against him. Indeed, virtually every criminal defendant chooses to be present at trial, and some choose to testify. Brooks made it clear that the state cannot dictate when a defendant will testify if he chooses to exercise that right. It follows that the right to testify cannot be abridged by prosecutorial comment on the timing of a defendant's testimony.

C. Recognizing the grant of certiorari in Agard, the Fourth Circuit declined to reach the merits but held that any error was harmless[10]. The Court reasoned that petitioner's inculpatory testimony was "devastating" and thus the prosecutor's remarks could not have affected the verdict, citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

The Fourth Circuit's harmless error analysis applying Brecht conflicted with that of the Second Circuit in Agard, 117 F.3d at 714-15. Where the forensic evidence could not settle the question of who fired the multiple shots that killed the Kellers, the jurors had to determine whether they believed petitioner or Cruse. If the jurors believed petitioner, then the guilt phase verdict would have been affected[11] and very likely the sentencing phase as well.

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[10] The Fourth Circuit noted that state court decisions on the merits of a claim are reviewed under sec. 2254(d)(1), citing the Fourth Circuit's interpretation of that statute in Green v. French, 143 F.3d 865, 870 (4th Cir. 1998), cert. denied, 119 S. Ct. 844 (1999). The Fourth Circuit failed to note this Court's grant of certiorari in Williams v. Taylor, 119 S. Ct. 1353 (1999), to review the Fourth Circuit's interpretation and application of 28 U.S.C. sec. 2254(d)(1).

[11] Petitioner was convicted of three capital counts based on two murders. If the jurors rejected Cruse's testimony, Williams could be convicted of the capital murder of Mr. Keller only if the jurors concluded Williams' one shot resulted in a fatal wound.

The Fourth Circuit's harmless error analysis also ignored this Court's discussion of harmless error in a series of cases. A reviewing court must determine whether the error contributed to the conviction on the charge at issue and to what extent. See Chapman v. California, 386 U.S. 18, 24 (1967); Yates v. Evatt, 500 U.S. 391, 402-04 (1991); Arizona v. Fulminante, 499 U.S. 279, 296 (1991); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

The error alleged by petitioner goes to his convictions for capital murder. Thus, the evidence that petitioner was the triggerman responsible for the murders of both Mr. and Mrs. Keller must be independently assessed apart from any evidence supporting his convictions on other, noncapital charges and apart from his inculpatory testimony. Both petitioner and Cruse admitted committing other offenses, and each admitted firing one shot. However, the only evidence that petitioner shot and killed both Mr. and Mrs. Keller was provided by Cruse. Against this evidence, the court must weigh the subjective effect of the error on the jury's verdict. By urging the jury to find Cruse the more credible witness because petitioner had exercised his right of confrontation, the prosecutor improperly tipped the scales against petitioner.

Where credibility was the only issue for the jury, the prosecutor's error had a substantial and injurious effect or influence in determining the jury's verdict on the capital counts. Brecht, 507 U.S. at 637. Moreover, even where a court has "grave doubt" about the harmlessness of an error, the issue must be

resolved in petitioner's favor. See O'Neal v. McAninch, 513 U.S. 432, 437 (1995); California v. Roy, 117 S. Ct. 337 (1996), reh'g. denied, 117 S. Ct. 719 (1997). Under either analysis, the error in petitioner's case was not harmless.

D. The Fourth Circuit affirmed the district court's alternative holding that under pre-AEDPA law, the rule petitioner advocated would violate Teague. A 7. This decision merits further review. This Court has repeatedly held that a prosecutor may not comment on the defendant's exercise of a constitutional right. See, e.g., United States v. Hasting, 461 U.S. 499, 505-507 (1983) (failure of defendant to offer evidence); Anderson v. Nelson, 390 U.S. 523, 525 (1968) (per curiam)(comment on refusal to testify); Griffin v. California, supra (same); Johnson v. United States, 318 U.S. 189, 196-97 (1943) (comment on invocation of privilege against self-incrimination).

Petitioner's trial was conducted in 1994, well after the decisions cited herein. His conviction became final on June 26, 1995. Williams v. Virginia, 515 U.S. 1161 (1995). The rule petitioner advocates does not "break new ground" or "impose[] a new obligation on the States" and was, in fact, dictated by precedent at the time his conviction became final. See O'Dell v. Netherland, 117 S. Ct. 1969, 1973 (1997). In light of this Court's precedents, the state court was "objectively unreasonable" when it denied petitioner relief. Ibid.

E. The decision below has important and disturbing implications. If allowed to stand, the decision will permit prosecutors to

penalize a defendant's exercise of his right of confrontation in every case in which a criminal defendant testifies[12]. The threat of such improper cross-examination will also deter other defendants from taking the stand. For all these reasons, this Court should review the decision below. At a minimum, this Court should grant a stay of execution and hold a decision on this petition in abeyance pending this Court's decision in Portuondo v. Agard.

II. THE FOURTH CIRCUIT'S INTERPRETATION OF 28 U.S.C SEC. 2254(E)(2) PRESENTS AN ISSUE OF CRITICAL IMPORTANCE, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, AND IS CONTRARY TO THIS COURT'S PRECEDENTS.

This case presents an issue of critical importance: whether Section 2254(e)(2), which severely restricts federal habeas evidentiary hearings, applies to claims never raised in state court when the state suppressed the relevant facts, denied petitioner all discovery, and denied petitioner all investigative and expert assistance to discover and develop claims in state proceedings.

A. Prior to the passage of the Anti-terrorism and Effective Death Penalty Act (AEDPA), Pub.L. 104-132, 110 Stat. 1214 (1996), the standards governing the decisions of district courts to grant evidentiary hearings in habeas corpus cases were set forth in two decisions of this Court: Townsend v. Sain, 373 U.S. 293 (1963)

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[12] The Second Circuit in Agard, 117 F.3d at 712 n. 15, recognized this danger:

> It is certainly true that defendants are present in courtrooms every day. We hope it is not true that prosecutors in courtrooms all across the country are every day commenting upon a criminal defendant's presence at his own trial as though that presence were a license to lie. We intend to ensure that there is never a day on which they are free to comment within our jurisdiction.

and, subsequently, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). In Tamayo-Reyes, this Court left Townsend intact with but one exception. The Court held that a petitioner is not entitled to an evidentiary hearing where he has negligently failed to develop a material fact in state court proceedings. Tamayo-Reyes, 504 U.S. at 5. The Court thereby eliminated one of the five Townsend circumstances under which a petitioner is entitled to an evidentiary hearing as a matter of right. See, 504 U.S. at 18 (O'Connor, J., dissenting). The Court adopted one "narrow exception." A hearing would be mandated if the petitioner could show that a fundamental miscarriage of justice would result from the failure to hold a federal evidentiary hearing. Id. at 12.

Tamayo-Reyes, however, was subsumed by Section 104 of the AEDPA, codified as 28 U.S.C. sec. 2254(e)(2). See, e.g., Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir.), cert. denied, 118 S. Ct. 462 (1997); Weeks v. Bowersox, 119 F.3d 1342, 1354 n. 12 (8th Cir. 1997)(sec. 2254(e)(2) "superseded" Tamayo-Reyes); Lawrie v. Snyder, 9 F. Supp.2d 428, 438 & n. 5 (D. Del. 1998)(same); Liebman, J. and Hertz, R., Federal Habeas Corpus Practice and Procedure, sec. 20.2b, pp. 741-42 (3d ed.) ("AEDPA thus supersedes Tamayo-Reyes and the portion of Townsend v. Sain that Tamayo-Reyes itself has superseded [.]"). The relevant subsection, 2254(e)(2), restricted the availability of evidentiary hearings by eliminating the discretion this Court had left intact in Tamayo-Reyes. It also modified the rule of Tamayo-Reyes by creating a more difficult standard for overcoming default when it has occurred. Compare, 28

U.S.C. sec. 2254(e)(2)(A) and (B) with Tamayo-Reyes, 504 U.S. at 11-12.

Title 28 U.S.C. sec. 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State Court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -
>
> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The first portion of the statute ("If the applicant has failed to develop . . .") sets out the conditions precedent for its application. Only if the conditions precedent are satisfied must a petitioner meet the highly restrictive conditions set forth in (A), new law or new facts, and (B), actual innocence, to obtain a federal evidentiary hearing.

B. Petitioner argued below that the restrictive provisions of sec. 2254(e)(2) were applicable to petitioner's claims only if petitioner had been provided an opportunity to develop the factual bases of his claims in state court and had negligently failed to do so. Petitioner maintained that because he had demonstrated cause for his failure to present specific claims in state court and prejudice, sec. 2254(e)(2) was inapplicable to those claims, and the federal habeas court was not barred from holding an evidentiary

hearing.

The Fourth Circuit rejected this argument and applied sec. 2254(e)(2) on appeal to three claims petitioner had never presented in state court: two Sixth Amendment claims arising from juror and prosecutorial misconduct during voir dire and a third Sixth Amendment claim arising from the prosecutor's failure to disclose Cruse's psychiatric report. In its emergency Order staying the evidentiary hearing and remanding with instructions, the Fourth Circuit also directed the district court to apply sec. 2254(e)(2) to a claim petitioner had raised in state court, i.e., the state's failure to reveal a sentence agreement with Cruse in violation of the Sixth Amendment[13].

The Fourth Circuit's application of sec. 2254(e)(2) to petitioner's claims conflicts with the decisions of other Circuit Courts of Appeals interpreting that statute. Every Circuit Court of Appeals to interpret this section, including the Fourth, has concluded that section 2254(e)(2) does not apply "where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court. . ." Cardwell v. Greene, 152 F.3d 331, 337 (4th Cir. 1998), cert. denied, 119 S. Ct. 587 (1998). See also

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[13] On appeal, the Fourth Circuit implicitly admitted this was error, failed to correct the error, and then erroneously dismissed the claim under sec. 2254(d)(1). That section was inapplicable because the state's interference prevented development of the facts. There was no discovery, no hearing, and the state improperly hid the primary witness, Cruse, from petitioner's counsel. See United States v. Walton, 602 F.2d 1176, 1179 (4th Cir. 1979).

Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998) (where a petitioner has diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so, sec. 2254(e)(2) does not apply); McDonald v. Johnson, 139 F.3d 1056, 1059 (5th Cir. 1998) (a petitioner cannot be said to have 'failed to develop' a factual basis for his claim unless the undeveloped record is a result of his own decision or omission); Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir.) ("To be attributable to a 'failure' under federal law, the deficiency in the record must reflect something the petitioner did or omitted"), cert. denied, 118 S. Ct. 462 (1997); Jones v. Wood, 114 F.3d 1002, 1013-14 (9th Cir. 1997) (petitioner did not 'fail to develop' where the state court denied a hearing); Love v. Morton, 112 F.3d 131, 136 (3rd Cir. 1997) (petitioner did not fail to develop basis of claim where trial court's actions precluded development of record); Hunter v. Vasquez, 1996 WL 612484 (N.D. Cal. 10/03/96) at *5-*6.

To determine whether section 2254(e)(2) governs a claim, the court must examine the reasons why the claim was not presented in state court. As the Seventh Circuit explained in Burris:

> [T]he word 'fail' [in sec. 2254(e)(2)] cannot bear a strict-liability reading, under which a federal court would disregard the reason for the shortcomings of the record. If it did, then a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts. Nothing in sec. 2254(e) or the rest of the AEDPA implies that states may manipulate things in this manner.

116 F.3d at 259 (citing, Love, 112 F.3d 131 (3rd Cir. 1997)) (other citations omitted). See also, Cardwell, 152 F.3d at 338; Hunter v. Vasquez, supra at *5-*6 (petitioner did not fail to develop facts

where state denied discovery, investigation funds, and a hearing). Hence, where a petitioner has not "failed," the condition precedent for the statute's application has not been met, and section 2254(e)(2) does not govern the claim.

This interpretation of sec. 2254(e)(2) harmonizes with this Court's well-developed doctrine of "cause and prejudice" to overcome procedural default in state court. See Wainwright v. Sykes, 433 U.S. 72 (1977); Murray v. Carrier, 477 U.S. 478 (1986); Amadeo v. Zant, 486 U.S. 214 (1988); Coleman v. Thompson, 501 U.S. 722 (1991); Dobbs v. Zant, 506 U.S. 357 (1993). Section 2254(e)(2) is simply inapplicable where the petitioner has not "failed," i.e., where the petitioner can demonstrate cause and prejudice to excuse default. See Tamayo-Reyes, 504 U.S. at 11 (petitioner entitled to a hearing if he can show cause and actual prejudice). The miscarriage of justice exception set forth in Tamayo-Reyes and codified in sec. 2254(e)(2)(B), i.e., "clear and convincing evidence" of innocence, comes into play only when the petitioner has been given a full and fair opportunity in state court and has been negligent and failed to develop his claims.

B. Consistent with this Court's precedents, the district court initially found that petitioner had demonstrated both cause and prejudice on his Sixth Amendment claims arising from the voir dire. The juror, under oath, failed to reveal the relevant facts and the prosecutor, who knew the facts, failed to disclose them. The court found there was "no evidence that [petitioner's] defense or state habeas counsel knew or could have known" the facts without

disclosure by the juror or the prosecutor. A 52.

The district court found that the juror's failure to provide complete and truthful answers on voir dire demonstrated her bias and established prejudice to petitioner, citing United States v. Bynum, 634 F.2d 768, 771 (4th Cir. 1980)[14]. Hence, petitioner was entitled to a hearing. See McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984); Smith v. Phillips, 455 U.S. 209, 221-222 (1982).

In response to the Fourth Circuit's remand Order, the district court found that the conditions precedent for application of 2254(e)(2) had not been satisfied:

> [I]t is clear that [petitioner] did not "fail[] to develop" the factual basis of his claims. The record is replete with examples of state habeas counsel's numerous attempts to obtain the evidence required to discover, present and prove [petitioner's] claims--including informal attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied [petitioner] the opportunity to develop the necessary facts by denying all of [petitioner's] requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record.

A 16. However, given the Fourth Circuit's directive, the district

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[14] See also, Dyer v. Calderon, 151 F.3d 970, 982 (9th Cir. 1998)(in banc) ("The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent."); United States v. Scott, 854 F.2d 697, 698 (5th Cir. 1988) (juror failed to reveal brother was deputy sheriff and his office had part in the investigation); Burton v. Johnson, 948 F.2d 1150, 1159 (10th Cir. 1991), cert. denied, 507 U.S. 1043 (1993) (bias demonstrated where juror failed to reveal abusive family situation where defendant was on trial for killing abusive husband); United States v. Perkins, 748 F.2d 1519, 1531-33 (11th Cir. 1984) (refusal to disclose, inter alia, that juror knew defendant gives rise to presumption of actual bias); McCoy v. Goldston, 652 F. 654, 658 (6th Cir. 1981) (district court shall presume bias where juror deliberately conceals information).

court reluctantly applied 2254(e)(2), denied a hearing, and dismissed all remaining claims. A 19.

On appeal, the Fourth Circuit rejected petitioner's renewed argument that sec. 2254(e)(2) did not apply to his request for a hearing. "To escape the requirements of section 2254(e)(2), a petitioner must "diligently . . . develop the factual basis of" his claim in state court." A 4. The Fourth Circuit ignored the district court's factual findings concerning petitioner's efforts to develop his claims in state court. The Fourth Circuit then assessed petitioner's jury misconduct claims under sec. 2254(e)(2)(A)(ii) and found that he had not exercised due diligence in state court[15].

The Fourth Circuit also held that petitioner could not demonstrate cause and prejudice to excuse default under "pre-AEDPA law." A 5. This Court's recent decision in Strickler v. Greene, 119 S. Ct. 1936 (1999), was not cited and dictates a different result. In Strickler, the petitioner demonstrated cause to excuse

---

[15] Ignoring the fact that federal counsel discovered the juror claims only after privately retaining an investigator (the very assistance denied in state court), the panel illogically concluded that state habeas counsel could have discovered the relevant evidence because federal counsel had done so. A 4. The Fourth Circuit then imposed the standard for presentation of a constitutional claim to a state court on a petitioner's request for state investigative assistance. The Court cited no Supreme Court or circuit court precedent supporting this novel requirement and for obvious reasons. If habeas counsel had known of the juror claims, he would not have required an investigator but would have included the claims in the state petition. An investigator was required to discover unknown facts supporting potential claims. See McFarland v. Scott, 512 U.S. 849, 855 (1994). Habeas pleading by its very nature concerns facts outside the record.

default based on the state's representations at both trial and state habeas that all Brady materials had been disclosed. This Court held that where trial counsel had reasonably relied on the state's representations, it was equally reasonable for state habeas counsel to rely on those same representations. Citing Murray v. Carrier, 477 U.S. 478, 491 (1986), this Court emphasized that the standard for cause does not vary depending on the timing of a procedural default. Id. at 1949. When finding cause for default, the Court held that state habeas counsel had no obligation to plead a claim without evidentiary support. Habeas counsel need not assume that a prosecutor has acted improperly. Id. at 1950.

Petitioner presents the very same situation. The juror answered under oath, and trial counsel had no reason to doubt her veracity. The prosecutor knew at trial that the juror had not answered truthfully, but the prosecutor failed to reveal the relevant facts. The state has never argued that petitioner defaulted the juror and prosecutorial misconduct claims at the trial level, but has implicitly conceded that trial counsel were entitled to rely on the juror's voir dire responses and to assume that the prosecutor would properly fulfill his official duties. As Strickler held, if it was reasonable for trial counsel to rely on representations made during trial, it was equally reasonable for state habeas counsel to rely on those same representations. As in Strickler, the state never disclosed the relevant facts in state habeas but instead actively impeded petitioner's efforts by arguing that an investigation of juror misconduct would be "frivolous" and

an improper intrusion on the jurors. JA 395. Thus, the state's actions successfully blocked petitioner's discovery of the relevant facts in state court. Under the principles set forth in Strickler, Amadeo v. Zant, 486 U.S. 214, 222 (1988), and Murray v. Carrier, 477 U.S. 478, 488 (1986), petitioner demonstrated that an objective factor external to the defense impeded his counsel's efforts to comply with the state's procedural rules. See also Coleman v. Thompson, 501 U.S. 722, 753 (1991)(external impediment must make compliance "impracticable" and basis of claim not "reasonably available.")

Petitioner was not negligent under either the AEDPA or pre-AEDPA law. He was prejudiced as the seating of a biased juror creates a structural defect in the trial. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991); Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986); Tumey v. Ohio, 273 U.S. 510, 535 (1927).

C. The Fourth Circuit applied sec. 2254(e)(2) to petitioner's Brady claim arising from Cruse's psychiatric report. The Fourth Circuit held that federal counsel's discovery of the report demonstrated that state habeas counsel had not exercised diligence as required by sec. 2254(e)(2)(A)(ii), and petitioner could not demonstrate innocence under 2254(e)(2)(B). A 5.

Again, section 2254(e)(2) was inapplicable. Both trial counsel and state habeas counsel tried to develop this claim. They requested disclosure of all Brady material. State habeas counsel specifically requested all psychiatric reports of any witness that

could effect the witness' credibility. JA 379. Irrespective of any request, the state had a duty to disclose the report. See, e.g., Strickler, supra; Kyles v. Whitley, 514 U.S. 419 (1995). State habeas counsel personally examined Cruse's trial file and did not find the report therein. JA 1502. His discovery motions were denied by the court, all informal discovery efforts were rebuffed, and all motions for investigative assistance were denied.

As the district court recognized, petitioner was prejudiced. JA 1302-03. His conviction on at least two capital counts depended entirely on Cruse's testimony and the jury's assessment of Cruse's credibility. Had Cruse been properly impeached, petitioner's own testimony may well have been unnecessary. Suppression of the report was prejudicial under any Brady analysis.

D. The Fourth Circuit erred when it failed to remand for an evidentiary hearing on the Brady claim alleging the state's failure to reveal a sentence agreement with Cruse in violation of the Sixth Amendment. The Fourth Circuit failed to correct its erroneous Order directing the district court to apply sec. 2254(e)(2) to this claim after the district court had granted an evidentiary hearing. Petitioner alleged numerous facts demonstrating that an undisclosed sentence agreement existed (A 75-76). He raised the claim in state court, was denied discovery and a hearing, and had not "failed" to develop his claim. The state denied development of the facts. See Cardwell v. Greene, 152 F.3d at 337. Petitioner was prejudiced as the district court found. A 77.

E. When possible, a state should be given the first opportunity

to correct its own errors. However, the state zealously opposed all efforts by petitioner's counsel to discover and develop claims and to obtain essential expert resources. While a state may elect to deny all resources, discovery, and/or a hearing in state habeas, it cannot then argue that the indigent petitioner, who requested the necessary resources for claim discovery and development, is responsible for the failure to develop the state court record and is barred from a federal evidentiary hearing. See Correll v. Stewart, 137 F.3d 1404, 1414 (9th Cir. 1998); Burris, 116 F.3d at 359.

This issue merits this Court's review. Section 2254(e)(2) presents a procedural bar to federal evidentiary hearings. Its interpretation and application by the lower courts will have immeasurable impact on habeas petitioners in every jurisdiction.

III. THE FOURTH CIRCUIT'S INTERPRETATION OF REVISED 21 U.S.C. SEC. 848(Q)(9), GOVERNING THE PROVISION OF EXPERT ASSISTANCE FOR INDIGENT DEFENDANTS, IS INCONSISTENT WITH THE TEXT AND INTENT OF THE STATUTE AND McFARLAND v. SCOTT, 512 U.S. 849 (1994).

The third issue in this case deals with the provision of investigative and expert services for capital defendants and habeas petitioners under revised 21 U.S.C. sec. 848(q)(9). The Fourth Circuit has interpreted the statute to require an adversarial hearing--a requirement absent from the statute--before a defendant can request these essential services ex parte. This construction and interpretation of the statute merits this Court's review given its importance to the proper functioning of the criminal justice system and the representation of indigent defendants.

In every federal criminal action in which an indigent

defendant is charged with a capital crime, and in every habeas corpus action under 28 U.S.C. sec. 2254 or 2255, in which an indigent defendant has been sentenced to death, federal law authorizes investigative, expert, or other services to assist the defendant under 21 U.S.C. sec. 848(q)(9), if those services are reasonably necessary. Indigent defendants charged with noncapital federal crimes are also entitled to investigative, expert, and other services necessary for an adequate defense under the Criminal Justice Act, 18 U.S.C. sec. 3006A(e).

This Court recognized the importance of expert assistance when preparing a capital habeas petition in McFarland v. Scott, 512 U.S. 849, 855 (1994):

> The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified.

(Emphasis added); see also Ake v. Oklahoma, 470 U.S. 68, 82-83 (1985)(threshold showing sufficient to invoke constitutional right to expert assistance at trial may be made ex parte).

Prior to petitioner's appeal, the Fourth Circuit had acknowledged the critical function served by ex parte procedures when requesting expert and investigative assistance for indigents:

> The ex parte procedures in sec. 848(q). . . simply level the playing field between petitioners able to purchase (and thereby not disclose to the opposing side) the usual litigation services--experts, investigators, subpoena-servers--and those forced to request payment of these services from the court. [Citations omitted.]

In Re: Pruett, 133 F.3d 275, 279 (4th Cir. 1997); see also Lawson v. Dixon, 3 F.3d 743, 751 (4th Cir. 1993).

Consistent with the goal of providing resources to indigent defendants, prior to April 24, 1996, sec. 848(q)(9) provided in pertinent part:

> Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant . . . the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore under paragraph (10).

However, in April 1996 the AEDPA amended 21 U.S.C. sec. 848(q)(9) so that it now reads in pertinent part:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant . . . the court may authorize the defendant's attorneys to obtain such services . . .[and] shall order the payment of fees and expenses . . . No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

Significantly, the AEDPA did not limit the changes in sec. 848(q)(9) to requests for services by habeas petitioners. The changes apply equally to pretrial federal motions. Equally significant, the AEDPA did not amend 18 U.S.C. sec. 3006A(e) with respect to the right to seek services ex parte, or with respect to the court's obligation (rather than its discretion) to authorize those services upon a showing of necessity in federal criminal cases. Recognizing the strong link between these two statutes, the AEDPA itself provided, in amended 28 U.S.C. sec. 2254(h), that critical aspects of federal habeas proceedings under Section 2254 "shall be governed by section 3006A of title 18."

Petitioner had filed sealed motions for specific expert

assistance[16] and for permission to proceed ex parte. Petitioner had provided the court with a detailed memorandum setting forth the experts requested, the preserved claims in his state habeas petition related to the requested federal assistance, and his unsuccessful efforts to obtain this same assistance in state court. JA 579-596.

The district court interpreted amended 848(q)(9) to require petitioner to submit to adversarial proceedings to show the need for confidentiality -- even if the applicant asserts that he must disclose confidential information in order to make the required showing -- and to require an applicant to reveal his proposed federal claims and proposed investigation to his adversary prior to filing his petition before the Court would entertain his motions.

On appeal, the Fourth Circuit affirmed (A 7):

> In limiting ex parte requests for expert assistance, Congress was clearly addressing the routine approval of such requests even in those instances where expert or investigative services were unnecessary. . . . Allowing an ex parte hearing to determine the need for an ex parte hearing not only seems convoluted, but it also runs afoul of the plain language of the statute.

The Fourth Circuit's interpretation of sec. 848(q)(9) merits this Court's review. The amended statute does not mention or require an adversarial hearing. Such a construction of the statute requires a petitioner to reveal the very information he seeks to protect. Petitioner maintained below that the plain and proper

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[16] The district court initially granted these motions and petitioner was in the process of retaining experts when the Order was stayed. A 122. Thus, the district court had already concluded that petitioner had demonstrated that the services were necessary.

reading of the statute avoids this contradiction: if the need for confidentiality is demonstrated, then an ex parte request may be considered and a record must be made for later review[17]. The revised statute simply removes the requirement that all applications for services and assistance be made ex parte. A determination that confidentiality is required has been left to the discretion of the court to be determined on a case by case basis. Moreover, section 848(q)(9) clearly permits ex parte requests when a "proper showing is made concerning the need for confidentiality." See Shields v.Johnson, 48 F. Supp.2d 719 (S.D. Tex. 1999).

Furthermore, any construction of sec. 848(q)(9) that requires an indigent defendant to divulge confidential information to his adversary in order to obtain services runs afoul of the Constitution. Under a long line of Supreme Court cases, meaningful access to the courts cannot be restricted to persons of means. See Gardner v. California, 393 U.S. 367, 370-71 (1969)(stenographic

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[17] See, 1 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice & Procedure, sec. 19.3 at 695 (3d ed. 1998), citing Miller-El v. Johnson, Civ. No. 3:96 CV1992-H (N.D. Tex. June 18, 1997)(court denied State's request to strike petitioner's ex parte sealed motions for investigative funds and allowed petitioner to proceed ex parte; "[a]llowing the Respondent access to the confidential information contained in Petitioner's request to proceed ex parte directly conflicts with Congress' intent to authorize ex parte proceedings upon a proper showing"); Hawkins v. Calderon, CIV S-96-1155 LKK/PAN (E.D. Cal. May 6, 1997)(magistrate judge erred in permitting state to participate in proceedings to determine whether petitioner's funding request should be placed under seal and in requiring petitioner to serve state with copy of brief on need for confidentiality). Accord Calderon v. United States Dist. Ct., 107 F.3d 756, 761 & n.11 (9th Cir.), cert. denied, 118 S. Ct. 265 (1997) (state has no standing to appeal district court's treatment of request for investigative and expert funds).

transcript of evidentiary hearing in habeas must be provided to indigent habeas petitioner to enable him to prepare habeas petition to higher court); Bounds v. Smith, 430 U.S. 817, 821 (1977)(describing fundamental right of meaningful access to courts for habeas petitioners); Ex Parte Hull, 312 U.S. 546, 549 (1941)("[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus").

The right of meaningful court access is guaranteed in both criminal and civil actions. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971)(holding that filing fee for divorce actions violates due process if not waived for indigents). And this right indisputably applies to habeas proceedings. See Smith v. Bennett, 365 U.S. 708, 712 (1961)(regardless whether labeled as criminal appeal or habeas petition, procedures used by indigent prisoners to regain liberty lost through criminal process are safeguarded by constitutional right to equal protection).

Section 848(q)(9) governs the provision of expert services for all indigent, capital defendants and habeas petitioners in the federal courts. Review should be granted to address the proper interpretation and application of that statute.

CONCLUSION

The petition for writ of certiorari should be granted.

James E. Moore
Christian & Barton, L.L.P.
909 East Main Street, #1200
Richmond, VA 23219-3095

Barbara L. Hartung
(Counsel of Record)
1001 East Main Street, #504
Richmond, VA 23219

Counsel for Petitioner

CERTIFICATION OF SERVICE

I hereby certify that one copy of each of the following:

Motion For Leave To Proceed In Forma Pauperis

Application For A Stay Of Execution

Petition For Writ of Certiorari

Appendix to Petition For Writ of Certiorari

was served by Federal Express delivery service on counsel for the Respondent, Donald Curry, Senior Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219 on October 16, 1999.

Barbara L. Hartung

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In The Supreme Court Of The United States

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Barbara L. Hartung
ATTORNEY AT LAW
1001 East Main Street
Suite 504
Richmond, Virginia 23219
(804) 649-1088

Counsel for Petitioner

James E. Moore
CHRISTIAN & BARTON, L.L.P.
909 East Main Street
Suite 1200
Richmond, Virginia 23219
(804) 697-4100

Counsel for Petitioner

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FILED
UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 27, 1999

No. 99-1
CA-96-529-3

MICHAEL WAYNE WILLIAMS

Petitioner - Appellant

v.

JOHN B. TAYLOR, Warden, Sussex I State Prison

Respondent - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

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the way out of the house Williams informed Mrs. Keller that he planned to burn the house. Upon Mrs. Keller's request, Williams accompanied her back inside to get the Kellers' marriage license.

With Williams carrying the .38 and Cruse the .357, the two men walked the Kellers down a dirt road and into a thicket. Williams then took up a position directly behind Mr. Keller and Cruse stood behind Mrs. Keller. Williams said, "We'll shoot at the count of three." At the count of three, Williams shot Mr. Keller, who fell to the ground. Cruse did not fire. Williams turned to Cruse and told him to shoot. After Cruse shot and Mrs. Keller fell, Mr. Keller stood up again. Williams then shot him a second time. As Cruse began to walk away, [*4] Williams said, "Wait . . . . What if they ain't dead?" Williams then approached the Kellers and shot each a few more times.

Williams and Cruse next returned to the house, where they loaded the Kellers' Jeep Cherokee with their television set, microwave oven, stereo and speakers, and shotgun. After loading the Cherokee, the two men set fire to the house.

The next day Williams and Cruse sold some of the property they had taken from the Kellers. They then threw the remaining property and the .357 into the Rappahannock River and set fire to the Cherokee.

When James heard about the fire at the Kellers' house, she contacted the police and informed them that she had deposited Williams and Cruse near the house on the night of the fire. The police interviewed Cruse, who was unresponsive until the police located the bodies of Mr. and Mrs. Keller.

After consulting counsel, Cruse agreed to a plea bargain pursuant to which he would disclose his knowledge of the crimes in exchange for a promise from the Commonwealth not to seek the death penalty. Cruse then gave a statement in which he explained the events of the fateful night in detail, with the exception of Cruse's own participation in the [*5] rape of Mrs. Keller. Upon learning of Cruse's falsehood, the Commonwealth revoked its plea agreement with Cruse and later indicted him for capital murder.

Williams was indicted for the capital murder, robbery, rape, and abduction of Mrs. Keller; for the capital murder, robbery, and abduction of Mr. Keller; for capital murder based on two related homicides; statutory burglary; and arson. At trial in January 1994, Williams took the stand in his own defense. He confirmed significant parts of the Commonwealth's case. In particular, he indicated that he was the one who suggested robbing the Bear Creek Market, that it was his suggestion to set fire to the Kellers' house, and that he shot Mr. Keller in the head. He contradicted portions of the evidence presented against him, most of which was in the form of testimony by Cruse. Specifically, he denied that he also raped Mrs. Keller, that he fired any shots other than the first one, and that he was the instigator at various other points during the commission of the crimes.

The jury convicted Williams of capital murder. It then recommended the death sentence on the basis of Williams' future dangerousness and the vileness of his crimes. The [*6] trial court agreed with the jury's recommendation and sentenced Williams to death. The Supreme Court of Virginia affirmed the conviction and sentence, *Williams v. Commonwealth, 248 Va. 528, 450 S.E.2d 365 (Va. 1994)*, and the United States Supreme Court denied certiorari, *Williams v. Virginia, 515 U.S. 1161, 132 L. Ed. 2d 858, 115 S. Ct. 2616 (1995)*.

Williams then filed a petition for state habeas and moved for discovery, an evidentiary hearing, and expert assistance. The Supreme Court of Virginia denied these motions and the petition, stating without explanation that Williams' claims were meritless. The United States Supreme Court again denied certiorari. *Williams v. Netherland, 519 U.S. 877, 136 L. Ed. 2d 136, 117 S. Ct. 200 (1996)*.

Next, Williams filed a petition for habeas corpus in the United States District Court for the Eastern District of Virginia. The district court granted Williams an evidentiary hearing on three of his claims and dismissed the rest. Because Williams filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, this [*7] court entered a stay and instructed the district court to reconsider its grant of an evidentiary hearing in light of *28 U.S.C. § 2254*(e) as amended by that Act. After applying the AEDPA, the district court denied Williams' request for an evidentiary hearing and dismissed his petition in its entirety. Williams now appeals.

II.

Williams maintains he was entitled to an evidentiary hearing in the district court to establish several claims. Two of those claims arise under the Sixth Amendment. First, Williams claims that one of the jurors failed to answer honestly questions put to her on voir dire. See *United States v. Bynum, 634 F.2d 768 (4th Cir. 1980)*. Specifically, Williams contends that juror Bonnie Stinnett failed to disclose that she had once been married to Deputy Sheriff Claude Meinhard -who would testify for the Commonwealth -- when Stinnett was asked whether she was related to any witness in the case.

Williams also maintains that Stinnett withheld the fact that prosecutor Robert Woodson had represented her in her divorce proceedings. Second, Williams claims that the prosecutor improperly failed to correct the dishonest juror. Williams [*8] argues that Woodson failed to disclose both of these pieces of information and thereby violated his right to a fair trial. See *United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993)*.

With respect to his other claim, Williams maintains that the Commonwealth failed to provide him with exculpatory evidence as required under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. In particular, Williams claims that the Commonwealth failed to disclose a psychiatric evaluation that indicated Cruse had little specific recollection of the events surrounding the Keller murders.

A.

The district court denied Williams an evidentiary hearing on these claims. Section 2254(e)(2) provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) the claim relies on --

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through [*9] the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). The district court held that whatever else Williams could show, he could not demonstrate actual innocence as required by section 2254(e)(2)(B).

Williams argues that the district court erred in applying section 2254(e)(2) to his request at all. He maintains that section 2254(e)(2) applies only when the petitioner "has failed to develop the factual basis of a claim in State court." Id. (emphasis added); see also *Cardwell v. Greene, 152 F.3d 331, 337* (4th Cir.), cert. denied, *142 L. Ed. 2d 491, 119 S. Ct. 587 (1998)*. According to Williams, he did not "fail" to develop the factual foundation for any of these claims in state court. Williams argues that he had no way of knowing the specific facts underlying his claims. This is especially true, Williams maintains, because the Supreme Court of Virginia denied his requests for discovery, [*10] a hearing, and expert and investigative assistance. Williams contends, therefore, that section 2254(e)(2) should not apply to his request for a hearing in district court.

We disagree. To escape the requirements of section 2254(e)(2), a petitioner must "diligently . . . develop the factual basis of" his claim in state court. *Cardwell, 152 F.3d at 337*; see also *Wright v. Angelone, 151 F.3d 151, 164 (4th Cir. 1998)* (in order to obtain evidentiary hearing petitioner must show "why the factual predicate for this claim could not have been discovered earlier"). Ignorance in and of itself is not sufficient to show diligence; that ignorance must be reasonable. See *Coleman v. Thompson, 501 U.S. 722, 753, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)* (to be excused, legal basis of a claim must not be reasonably available). Nor may a petitioner's requests for investigative assistance, hearings, and discovery on state habeas be vague and conclusory. Rather, a petitioner must tie his requests to his specific claims and state with some particularity the need for assistance. To hold otherwise would permit criminal defendants to avoid the strictures [*11] of section 2254(e)(2) simply by churning out unsupported, boilerplate requests for state court discovery, hearings, and investigative and expert assistance.

Williams clearly has not "diligently sought to develop the factual basis of" his claims for federal habeas relief. *Cardwell, 152 F.3d at 337*. The documents supporting Williams' Sixth Amendment claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well. Williams' request for investigative assistance was also deficient. He alluded vaguely to "irregularities, improprieties and omissions" with regard to jury selection and asked for an investigator to examine "all circumstances relating to the empanelment of the jury and the jury's consideration of the case." This request in no way alerted the state habeas court to any specific claim. See *Picard v. Connor, 404 U.S. 270, 275, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971)* ("It would be unseemly in our dual system of government for a federal district court to upset [*12] a state court conviction without an opportunity to the state courts to correct a constitutional violation." (internal quotation marks omitted)). The failure to develop the Sixth Amendment claims was thus attributable to petitioner, not to the Supreme Court of Virginia's rejection of a fishing expedition request.

The same is true of Cruse's psychiatric evaluation. In support of his claim that the Commonwealth suppressed the evaluation, Williams provides nothing more than an affidavit from his state habeas counsel attesting to "no recollection of seeing this report in Mr. Cruse's court file." In light of the fact that Williams' federal habeas counsel located the evaluation in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence. Indeed, that failure tends to show that counsel did not act diligently.

Thus, it is clear that section 2254(e)(2) applies to Williams' request for a hearing. It is equally clear that Williams is ineligible for a hearing in federal court under this section. To be eligible, Williams must be able to demonstrate both due diligence and that "but for [the alleged] constitutional error, no reasonable factfinder [*13] would have found [him] guilty of the underlying offense." *28 U.S.C. § 2254*(e)(2)(A)(ii)-(B).

The discussion above makes plain that Williams was not duly diligent. Nor can Williams show that no reasonable factfinder would have found him guilty of capital murder. At trial Williams himself testified that he robbed the Kellers at gunpoint, was at least an accomplice to the rape of Mrs. Keller, and was the first person to shoot Mr. Keller in the head. The Commonwealth's Assistant Chief Medical Examiner, who performed the autopsy on Mr. Keller, testified that each gunshot wound suffered by Mr. Keller contributed to his death. Moreover, although Williams denied that he raped Mrs. Keller, tests on seminal fluid retrieved from her body revealed that some of the fluid could be attributed only to Williams.

Under Virginia law, this evidence was more than sufficient to convict him of capital murder. See *Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227, 235 (Va. 1991)* ("We adhere to the view that where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purposes of the [*14] capital murder statutes."); *Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57, 63 (Va. 1980)* (holding that it is only necessary to prove that defendant was immediate perpetrator in the murder and accomplice in the rape to convict of capital murder). In sum, it is not surprising that the district court found that based "on this evidence alone, Williams cannot demonstrate by 'clear and convincing evidence' that no reasonable juror would have found him guilty of the capital murder of Mr. Keller," that "Williams cannot make the requisite showing of 'innocence' under *28 U.S.C. § 2254*(e)(2)," and that "he is not entitled to an evidentiary hearing on his remaining claims."

B.

Even were section 2254 not to apply, Williams would be unable to show his eligibility for a hearing under pre-AEDPA law. See *Cardwell, 152 F.3d at 337* ("If, on the other hand, the applicant has not 'failed to develop' the facts in state court, the district court may proceed to consider whether a hearing is appropriate, or required under [pre-AEDPA law]."). Williams can show neither cause for nor prejudice from his failure to raise the aforementioned Sixth [*15] Amendment and Brady claims in state court. See *Keeney v. Tamayo-Reyes, 504 U.S. 1, 118 L. Ed. 2d 318, 112 S. Ct. 1715 (1992)*.

To demonstrate cause, Williams must establish that "'some objective factor external to the defense impeded counsel's efforts.'" *McCleskey v. Zant, 499 U.S. 467, 493, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991)* (quoting *Murray v. Carrier, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)*). As noted, Williams' failure to develop the facts in state court was due to his own lack of diligence. Williams neither brought forth reasonably available facts, nor made reasonable efforts to convince the Supreme Court of Virginia that additional discovery was warranted.

Williams is also unable to demonstrate prejudice. In order to do so, he must show that, absent the alleged constitutional violation, the outcome of the case likely would have been different. See *Carrier, 477 U.S. at 494*. As we have indicated, Williams' trial testimony alone was enough to convict him. See *Fitzgerald v. Greene, 150 F.3d 357, 366* (4th Cir.) (finding no actual prejudice based on overwhelming evidence [*16] of guilt, future dangerousness, and vileness of crime), cert. denied, *142 L. Ed. 2d 321, 119 S. Ct. 389 (1998)*. Moreover, Williams' claims with respect to juror Stinnett were marginal. It is hardly clear that Stinnett was related to Deputy Sheriff Meinhard given that the two divorced some fifteen years before Williams' trial. Furthermore, Meinhard's testimony was brief and did not speak to the critical facts of the trial. In fact, Williams' trial attorneys saw no need to cross-examine him. And the prosecutor explained his failure to notify the court of the relationship in an affidavit in which he stated that he simply did not remember being involved in Stinnett's divorce -- a plausible claim given that the divorce occurred fifteen years prior to Williams' trial and was uncontested. Finally, it is anything but clear that a divorce from one of the Commonwealth's witnesses would predispose a juror toward the Commonwealth's case.

For all of these reasons, the district court properly denied Williams' request for an evidentiary hearing.

III.

Williams next challenges the district court's dismissal of two claims on which the Supreme Court of Virginia found against Williams [*17] on the merits. We review decisions by state courts on the merits of a claim under section 2254(d). Section 2254(d) provides that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under normal circumstances, section 2254(d)(1) prohibits the issuance of the writ unless the state court decision conflicts squarely with Supreme Court precedent which is controlling as to law and fact, or if no such precedent exists, if "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant supreme [*18] court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French, 143 F.3d 865, 870 (4th Cir. 1998)*, cert. denied, *142 L. Ed. 2d 698, 119 S. Ct. 844 (1999)*. Where, as here, "the state court decision fails to articulate any rationale for its adverse determination . . . [we] must independently ascertain whether the record reveals a violation of [petitioner's constitutional rights.]" *Cardwell, 152 F.3d at 339*. Nonetheless an overall obligation of deference to the state court system still obtains, and a state court's perfunctory decision both constitutes an adjudication on the merits, see *Wright v. Angelone, 151 F.3d 151, 156-57 (4th Cir. 1998)*, and must be upheld if it "is at least minimally consistent with the facts and circumstances of the case." *Weeks v. Angelone, 176 F.3d 249, 259 (4th Cir. 1999)* (internal quotation marks omitted). Here that standard of minimal consistency was more than met.

A.

Williams first claims that the prosecution suppressed an alleged informal plea agreement that the Commonwealth had with [*19] Cruse in violation of Brady . The Supreme Court of Virginia was correct, however, to reject Williams' claim. In state court the Commonwealth supplied two affidavits -- one from Woodson and one from Cruse's trial counsel, Donald Blessing -- stating unequivocally that Cruse had no agreement. Specifically, Woodson swore, "At the time Cruse testified against Williams in January of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty." Similarly, Blessing stated, "Cruse testified truthfully at . . . trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence."

Moreover, before the district court, the Commonwealth introduced another affidavit from Blessing, in which he swore, "At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth." The district court thus properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's [*20] determination in a federal hearing in view of the unrefuted evidence. See *Eaton v. Angelone, 139 F.3d 990, 995* (4th Cir.) (refusing to transform "a federal habeas proceeding into a second trial."), cert. denied, *141 L. Ed. 2d 709, 118 S. Ct. 2338 (1998); Spencer v. Murray, 18 F.3d 229 (4th Cir. 1994)* (upholding denial of habeas corpus on basis of trial counsel's affidavit); *Sawyers v. Collins, 986 F.2d 1493, 1504 (5th Cir. 1993)* (en banc) (upholding denial of habeas corpus without evidentiary hearing even when state court made factual determination solely on basis of affidavits).

Finally, even if Williams could demonstrate that Cruse had an informal plea agreement, he could not show materiality. See *Kyles v. Whitley, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)* (demonstration of a Brady claim requires a showing of materiality). Given Williams' own testimony that he was at least an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head, we are confident there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding [*21] would have been different." *Id. at 433-34* (quoting *United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)* (opinion of Blackmun, J.)). As a result, we agree that Williams failed to demonstrate a Brady violation.

B.

Williams next argues that the prosecutor violated his Sixth Amendment right to be present at trial and to confront adverse witnesses. See *Illinois v. Allen, 397 U.S. 337, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970)* (Sixth Amendment right to be present at trial); *Pointer v. Texas,*

380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965) (Sixth Amendment right to confront prosecution's witnesses). Specifically, Williams charges that prosecutor Woodson impermissibly burdened those rights when, on cross-examination, he asked Williams, "You're the only witness who has sat in here through this trial and heard the testimony of every witness before you got to testify; isn't that correct?" n1 We need not decide whether allowing the prosecutor to proceed with this line of questioning was constitutional error because even if it were, the error was harmless. See *Sherman v. Smith, 89 F.3d 1134, 1137 (4th Cir. 1996)* **[*22]** (en banc) (noting that harmless error analysis applies to similar trial errors such as improper comment on defendant's silence at trial). Woodson's line of questioning was clearly aimed at impeaching Williams' testimony in the eyes of the jury.

n1 Indeed, the Supreme Court has recently granted certiorari on this very question. *Portuondo v. Agard, 143 L. Ed. 2d 346, 119 S. Ct. 1248 (1999).*

Such impeachment, however, would only have undermined Williams' exculpatory testimony, leaving unaffected his inculpatory testimony. And, as noted, Williams' inculpatory testimony was devastating. In such circumstances, it is clear that the error, if that it was, did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)* (internal quotation marks omitted).

Williams' claim is similarly unavailing under pre-AEDPA law. Whether or not we would determine independently that **[*23]** Woodson's question violated Williams' Sixth Amendment rights, it is clear that such a holding would create a new rule. See *Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).* Williams points to *Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965),* and *Brooks v. Tennessee, 406 U.S. 605, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972),* to support his claim. In Griffin, the Supreme Court established that drawing a negative inference from the fact that a defendant has exercised his right to remain silent violates his Fifth Amendment rights. *380 U.S. at 613.* In Brooks, the Court held that requiring a defendant to testify first or not to testify at all also impermissibly burdened his Fifth Amendment right to remain silent. *406 U.S. at 613.* Neither decision held that it is constitutionally impermissible to impeach the defendant's testimony if he decides not to remain silent by commenting on his singular ability to hear the entirety of the preceding witnesses' testimony. Indeed, the Court in Brooks was careful to recognize the "risk of a defendant's coloring his testimony **[*24]** to conform to what has gone before" and to stress that "our adversary system reposes judgment of the credibility of all witnesses in the jury." *Id. at 611.* In short, we cannot hold that either Griffin or Brooks "dictates" a finding of constitutional error in circumstances such as these. *Stringer v. Black, 503 U.S. 222, 228, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992).*

The district court correctly denied Williams' requests for relief on these two claims.

IV.

A.

Williams next argues that the district court misinterpreted *21 U.S.C. § 848*(q)(9). Section 848(q)(9) governs the granting of expert assistance to indigent prisoners in connection with their federal habeas proceedings, providing that

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, **[*25]** or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality . Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

Id. (emphasis added).

Williams contends that the district court erred in interpreting this section to require Williams to show a need for confidentiality in an adversary hearing. When the district court made that determination, Williams refused to participate in an adversary hearing, and the district court denied his request for expert assistance.

We agree with the district court. In limiting ex parte requests for expert assistance, Congress was clearly addressing the routine approval of such requests even in those instances where expert or investigative services were unnecessary. Section 848(q)(9) explicitly provides that there shall be no "ex parte . . . communication . . . pursuant to this section" without a showing of a need for confidentiality. Id. Allowing an ex parte hearing to determine the need for an ex parte hearing not only seems convoluted, but it also runs afoul of the plain language

[*26] of the statute. See *United States v. Gonzales, 150 F.3d 1246, 1264 (10th Cir. 1998)* (process is one that "is not to be held ex parte unless a proper showing is made concerning the need for confidentiality." (emphasis added) (internal quotation marks omitted)), cert. denied sub nom. *Albuquerque Journal v. Gonzales, 142 L. Ed. 2d 915, 119 S. Ct. 918 (1999); Patrick v. Johnson, 37 F. Supp. 2d 815, 816 (N.D. Tex. 1999)* ("Section 848(q)(9) clearly requires 'a proper showing . . . concerning the need for confidentiality' before the Court may consider any ex parte communication or request." (emphasis added) (quoting *21 U.S.C. § 848*(q)(9))).

The district court also rightly denied Williams' request for expert assistance. When Williams refused to proceed after the district court required him to demonstrate his need for confidentiality in an adversary hearing, he necessarily failed to show that expert services were "reasonably necessary." *21 U.S.C. § 848*(q)(9). n2

n2 We are unpersuaded by Williams' argument that our interpretation of section 848(q)(9) renders it unconstitutional. Williams' sole contention is that any reading of section 848(q)(9) that requires a petitioner to divulge confidential information impermissibly impinges on his right of access to the courts. See *Gardner v. California, 393 U.S. 367, 21 L. Ed. 2d 601, 89 S. Ct. 580 (1969)* (requiring that hearing transcripts that are made available to all be provided to indigent habeas petitioners to guarantee access to the courts). We do no more here than uphold the district court's determination that petitioner must demonstrate his need for confidentiality at a hearing. What information is disclosed at that hearing would of course remain within the discretion of the district court.

[*27]

B.

Finally, Williams argues that the district court erred by requiring him to file his federal habeas petition within 180 days of April 24, 1996 -- the AEDPA's enactment date -- pursuant to *21 U.S.C. § 2263*. Williams contends that section 2263 applies only to "opt-in" states -- those states that have met certain requirements pertaining to, inter alia, the appointment and compensation of counsel for postconviction relief proceedings. Because this circuit has not yet recognized Virginia as an "opt-in" state, Williams contends that applying section 2263 was error. Instead, Williams maintains, the district court should have granted him one year from the effective date of the AEDPA to develop his petition further. See *Brown v. Angelone, 150 F.3d 370, 375 (4th Cir. 1998)* (granting petitioners whose convictions became final in a non-opt-in state before the effective date of the AEDPA one year from the effective date to file their petitions).

Any error here was harmless. Williams' case remained in district court for a year and a half after he filed his petition. Yet Williams made not one motion to amend on the basis of claims developed during **[*28]** the petition's pendency. Furthermore, although Williams requests a remand for an additional five months in which to amend his petition now, he provides no additional claims he might like to add. In all events, Williams cannot demonstrate that the district court's error prejudiced him.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

FILED
JUN - 3 1998
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS, Petitioner,	)	Civil Action No. 3:96CV529
v.	)	
J.D. NETHERLAND, WARDEN, Respondent.	)	

ORDER

Upon due consideration, for the reasons stated in the Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that:

(1) The Court's Order, dated April 13, 1998, granting an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5) is VACATED;

(2) Petitioner's federal habeas petition is DISMISSED in its entirety;

(3) Respondent's Motion For Summary Judgment is DENIED AS MOOT;

(4) At the expiration of thirty (30) days, unless an appeal has been filed, let the Clerk return to the appropriate repository such records as the Court has received in reference to this cause;

(5) This action is dismissed with prejudice; and

(6) All remaining motions not previously ruled on by the Court are DENIED AS MOOT.

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Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel of record.

/s/ Robert E. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DATE: June 3, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILE
JUN - 3 1998
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

MICHAEL WAYNE WILLIAMS, Petitioner,	)	Civil Action No. 3:96CV529
v.	)	
J.D. NETHERLAND, WARDEN, Respondent.	)	

MEMORANDUM

This matter is before the Court on remand from the United States Court of Appeals for the Fourth Circuit. For the reasons which follow, the Court concludes that Petitioner Michael Wayne Williams ("Williams") is not entitled to an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Accordingly, the Court will VACATE its Order granting Williams an evidentiary hearing on these claims, and DISMISS Williams' federal habeas petition in its entirety.

I.

On April 13, 1998, this Court dismissed the majority of Williams' federal habeas claims, but granted an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Respondent J.D. Netherland, Warden of Mecklenberg Prison ("Respondent"), subsequently moved for summary judgment, arguing that this Court

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misapplied applicable federal law. The Court heard argument on the motion and took the matter under advisement. Respondent then moved the Court for a stay of its Order requiring the evidentiary hearing, pending resolution by the Fourth Circuit of an Application For Emergency Stay and a Petition For A Writ Of Mandamus And Prohibition which Respondent filed the next day. On May 27, 1998, the Fourth Circuit granted Respondent's Application For An Emergency Stay and remanded the matter for further proceedings.[1]

II.

A. Applicability of 42 U.S.C. § 2254(e)(2)

In remanding the matter, the Fourth Circuit directed this Court to apply the requirements of 28 U.S.C. § 2254(e)(2) in evaluating whether Williams is entitled to an evidentiary hearing on his claims. See CA4 Stay Order (May 27, 1998) at 2. A section 2254 petition is ordinarily limited to the factual record developed in state court proceedings, as the amended section 2254(e)(2) limits a petitioner's ability to present evidence in a federal habeas proceeding that was not considered by the state

[1] The Fourth Circuit withheld ruling on Respondent's Petition For A Writ Of Mandamus And Prohibition until this Court reevaluated Williams' entitlement to an evidentiary hearing under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

court.

Specifically, section 2254(e)(2), as amended, provides that a petitioner may not present evidence in a federal habeas proceeding that was not considered by the state court if the petitioner "failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). In addition, a petitioner is only entitled to an evidentiary hearing if:

> (A) the claim relies on --
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

While the Fourth Circuit has not yet addressed the applicability or meaning of section 2254(e)(2), Judge Ellis has carefully considered the proper interpretation of this section and concluded the following:

> [A]n applicant "fails" when he does not take or seek the opportunity to develop evidence in a state court proceeding. This is where (e)(2)

> applies. And this is where (e)(2)(A) may forgive the failure if new facts or a retroactive change in constitutional law form the basis of a claim. In contrast, an applicant does not "fail" where he seeks, but is denied, the opportunity to develop facts in state court. In this event, the rigorous standard of § 2254(e)(2) will not apply.

Cardwell v. Netherland, 971 F. Supp. 997, 1011 (E.D. Va. 1997). Thus, a petitioner's "failure" to develop the factual basis of a claim in state court proceedings must be attributable to some sort of fault on the part of the petitioner--i.e. something the petitioner did or omitted to do.

Other district and circuit courts have reached similar conclusions. See, e.g., Jones v. Woods, 114 F.3d 1002, 1013 (9th Cir. 1997) ("Where, as here, the state courts simply fail to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims."); Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir. 1997) ("To be attributable to a 'failure' under federal law the deficiency in the record must reflect something the petitioner did or omitted."); Hunter v. Vasquez, 1996 WL 612484, *6 (N.D. Cal. 1996) (holding that where the state court denies petitioner's requests for discovery, investigatory funds, and a hearing, "the Court cannot find that Petitioner failed adequately to develop the facts of his claims in state court.").

Moreover, the United States Supreme Court's recent decision in Breard v. Greene, 118 S. Ct. ___, 1998 U.S. LEXIS 2465 (April 14, 1988), does not compel a different conclusion. In Breard, the Supreme Court simply reiterated what the plain language of section 2254(e)(2) and the previously cited cases reveal--that the limitation on evidentiary hearings in federal habeas proceedings applies only when the petitioner fails to develop the factual basis of a claim in state court proceedings. See id. at *3. Contrary to Respondent's tortured interpretation of the relevant language, the Supreme Court did not hold that the word "fail" in section 2254(e)(2) be given a strict liability reading. As the Seventh Circuit has noted, if such was the case, "then a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts. Nothing in sec. 2254(e) or the rest of the AEDPA implies that states may manipulate things in this manner." Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir. 1997).

Thus, the plain meaning of section 2254(e)(2) prohibits a federal evidentiary hearing only in those cases where a petitioner has been afforded an opportunity to develop evidence in state habeas court, but has failed to do so. See 28 U.S.C. § 2254(e)(2); Cardwell v. Netherland, 971 F. Supp. 997, 1011 (E.D.

Va. 1997). Only under such circumstances is this Court precluded from considering new facts presented for the first time in federal habeas proceedings or granting an evidentiary hearing for the consideration of same.

In Petitioner's case, it is clear that he did not "fail[] to develop" the factual basis of his claims. The record is replete with examples of state habeas counsel's numerous attempts to obtain the evidence required to discover, present, and prove Williams' claims--including informal attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied Williams the opportunity to develop the necessary facts by denying all of Williams' requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record. Under such circumstances, the Court is hard-pressed to find that Williams "failed to develop the factual basis of a claim in State Court proceedings," thereby triggering application of section 2254(e)(2).

Despite its concerns over the applicability of section 2254(e)(2) to cases such as the present one, however, this Court has been directed by its Court of Appeals to apply section 2254(e)(2) to Williams' case. Under that stringent standard,

which is now the law of this case, the Court concludes that Williams is not entitled to an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5).

B. Analysis

As discussed above, unless Williams can satisfy both subsection (A) and subsection (B) of 28 U.S.C. § 2254(e)(2), this Court must deny him an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Based on the present record, the Court agrees with Respondent's argument that "regardless of whether petitioner can satisfy § 2254(e)(2)(A), he cannot possibly satisfy the stringent requirements of § 2254(e)(2)(B)." Resp't Resp. to CA4 Stay Order at 4.

Subsection (B) of 28 U.S.C. § 2254(e)(2) requires a showing by "clear and convincing evidence that but for [the alleged] constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). In the instant case, Williams was convicted of capital murder on evidence, including his own testimony, which demonstrated that he was a participant in the armed robbery of Mr. and Mrs. Keller, that he was at minimum an accomplice in the rape of Mrs. Keller, and that he fired the first shot into Mr. Keller's head. According to the medical evidence presented at

trial, any of the three gunshot wounds to Mr. Keller's head could have been potentially lethal and all three definitely contributed to his death. See Tr. 1-4-94 at 252-56, 262-64. Based on this evidence alone, Williams cannot demonstrate by "clear and convincing evidence" that no reasonable juror would have found him guilty of the capital murder of Mr. Keller.

Moreover, there is no "but for" nexus between Claims I(A), IV(A)(1), or IV(A)(5) and the "innocence" requirement of subsection (B). As noted by Respondent, Claims I(A) and IV(A)(5) which involve a juror's allegedly untruthful answers during voir dire do not have any bearing on the evidence presented at trial of Williams' guilt in the shooting death of Mr. Keller. Furthermore, even assuming arguendo that some sort of informal understanding did exist between Williams' co-defendant, Cruse, and the Commonwealth prior to Cruse's testimony at Williams' trial [Claim IV(A)(1)], Williams' own testimony established that he shot Mr. Keller during the commission of a robbery and subsequent to the rape of Mrs. Keller and that therefore, he is guilty of capital murder. Thus, even if the jury chose to believe Williams' version of the shootings over Cruse's testimony, Williams himself admitted under oath to firing the first shot into Mr. Keller's head--a shot which the medical

examiner testified as being potentially lethal.

In light of the foregoing, the Court finds that Williams cannot make the requisite showing of "innocence" under 28 U.S.C. § 2254(e)(2) and thus, he is not entitled to an evidentiary hearing on his remaining claims. Accordingly, the Court will VACATE its Order granting an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5), and DISMISS Williams' federal habeas petition in its entirety.

An appropriate Order shall issue.

UNITED STATES DISTRICT JUDGE

DATE: June 3, 1998

FILED: May 27, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-17
(CA-96-529-3)

In Re: FRED W. GREENE, Warden,
Mecklenburg Correctional Center,

Petitioner,

O R D E R

On November 20, 1996, Michael Wayne Williams filed a petition for a writ of habeas corpus in federal court in the Eastern District of Virginia. On April 13, 1998, the district court dismissed most of Williams' claims but granted him an evidentiary hearing on three claims. That evidentiary hearing is scheduled to occur on June 2, 1998. The Commonwealth now seeks to prevent the district court from holding the evidentiary hearing by filing an application for an emergency stay and a petition for a writ of mandamus and prohibition with this court.

Both parties agree that Chapter 153 of the Antiterrorism and Effective Death Penalty Act (AEDPA) governs Williams' petition.

AEDPA establishes certain limits on a court's ability to conduct an evidentiary hearing where an applicant has failed to develop the factual basis of a claim in state court. In such cases, the court may hold an evidentiary hearing only if the claim satisfies two requirements. First, the claim must rely on either certain retroactive new rules of constitutional law or "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A). Second, the underlying facts must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Id. § 2254(e)(2)(B).

In granting the evidentiary hearing, the district court did not apply these requirements. Instead, it simply cited several pre-AEDPA cases to support its conclusion that defendant has demonstrated cause and prejudice. This, we believe, was error.

Accordingly, the warden's application for an emergency stay is granted and the matter is remanded for further proceedings. On remand, the district court must determine whether, under AEDPA, Williams is entitled to an evidentiary hearing on these claims. Until the district court has evaluated Williams' entitlement to an evidentiary hearing under the strict requirements of AEDPA, we believe it would be premature to act on any petition for a writ of

mandamus and prohibition.

The warden's application for an emergency stay is granted and the matter remanded for further proceedings as set forth herein.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Williams. Judge Hamilton voted to deny the application and petition.

For the Court

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
APR 13 1998
Clerk, U.S. District Court
Richmond, Va

MICHAEL WAYNE WILLIAMS, Petitioner,	)	
v.	)	Civil Action No. 3:96CV529
J.D. NETHERLAND, WARDEN, Respondent.	)	

ORDER

For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED AND ORDERED that all claims asserted in the Petition, except Claims I(A), IV(A)(1), and IV(A)(5) be and the same are hereby DISMISSED.

An evidentiary hearing on Claims I(A), IV(A)(1) and IV(A)(5) will be conducted commencing at 8:30 a.m. Monday, May 18, 1998.

Counsel for each of the parties herein shall, by 1:00 p.m., May 13, 1998, file with the Clerk of this Court proposed findings of fact and conclusions of law.

Let the Clerk send copies of the Memorandum and this Order to all counsel of record.

/s/
UNITED STATES DISTRICT JUDGE

Date APR 13 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
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MICHAEL WAYNE WILLIAMS, Petitioner,	)	
v.	)	Civil Action No. 3:96CV529
J.D. NETHERLAND, WARDEN, Respondent.	)	

MEMORANDUM OPINION

This matter is before the Court on the motion of Respondent J.D. Netherland, Warden of Mecklenberg Prison, to dismiss Petitioner Michael Wayne Williams' petition for a writ of habeas corpus for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The matter has been fully briefed by the parties and is ripe for decision. For the reasons which follow, the Court will GRANT IN PART AND DENY IN PART the motion.

I. FACTUAL BACKGROUND

In affirming Williams' conviction and sentence on direct appeal, the Virginia Supreme Court stated the facts of the case as follows:

> Between 9:30 and 10:30 p.m., on Saturday, February 27, 1993, Verena Lozano James drove Williams and Cruse to a rural area in Cumberland County and left them approximately one-half mile from Bear Creek Market. Williams and Cruse planned to

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rob persons in the market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.

The two men walked to the store, but found it closed. Williams suggested that "he knew a house where we can go; they'd have a couple thousand dollars." Cruse agreed, and they walked some distance to the Kellers' house. Upon arrival at the Kellers' house, Cruse returned the Black Hawk revolver to Williams and Cruse knocked on the door. When Mr. Keller opened the door, Williams pointed the gun at him and both men entered the house.

Williams ordered the Kellers to remove all their clothes, and he remained in the kitchen with them while Cruse began searching the house for money and other valuables. After Cruse found a fully loaded .38 caliber handgun, Williams decided "to tie [the Kellers] up," and Cruse did so. The Kellers were then placed, first in one closet and later in separate closets, and both men resumed their search.

After the two men had assembled some of the Kellers' property in the living room, at Williams's suggestion, first Williams, then Cruse, raped Mrs. Keller. Afterward, Williams ordered both Kellers to take showers and put on clean clothes, which they did. Williams then directed the Kellers to "take a walk" with them. Upon hearing that the two men planned to burn the house, Mrs. Keller took the Kellers' marriage certificate with her. As the Kellers, Williams, and Cruse left the house and walked "[d]own on a dirt road and into a thicket," Williams was carrying the .38 caliber handgun and Cruse was carrying the Black Hawk revolver.

When they were in the thicket with Williams standing behind Mr. Keller and Cruse standing behind Mrs. Keller, Williams said, "We'll shoot at the count of three." Upon Williams's count of three, he shot Mr. Keller with the .38 caliber handgun and Mr. Keller fell to the ground. However, Cruse did not shoot Mrs. Keller. Williams told Cruse to shoot Mrs. Keller because "he didn't want to leave no witnesses." Cruse then shot Mrs. Keller once with the Black Hawk revolver. After Mrs. Keller fell, Mr. Keller stood up and Williams shot him again with the .38 caliber handgun. As Cruse started to walk away, Williams said, "Wait ... [w]hat if they ain't dead?", and he shot each of the Kellers "a couple more times apiece" with the .38 caliber handgun.

The two men returned to the house, where they loaded a television set, microwave oven, shotgun, stereo set, and

speakers into Mr. Keller's jeep, and, at Williams's suggestion, set fire to the house. Williams and Cruse then took the jeep to Fredericksburg, where they sold some of the stolen property the next day. They then threw the remaining stolen property and the Black Hawk revolver into the Rappahannock River and set fire to the jeep.

Upon hearing of the Keller fire on Monday morning, Verena James advised the police that she had taken Williams and Cruse to an area not far from the Keller house on the night of the fire. Consequently, the police sought to question the two men regarding the fire. Williams and Cruse had returned to Cumberland County the Monday following the murders and the police were able to question Cruse. Williams, however, fled to Florida.

At first, Cruse furnished no information of value to the police. However, after the police discovered the bodies of the Kellers on Tuesday, Cruse consulted counsel. His counsel obtained a conditional agreement from the Commonwealth that it would not seek the death penalty provided Cruse gave a truthful statement of his knowledge of the crimes. Cruse then furnished information that implicated both men in all of the crimes charged, except for Cruse's role in Mrs. Keller's rape. Because Cruse breached his agreement in failing to tell the police that he had raped Mrs. Keller, the Commonwealth also indicted him for the Kellers' capital murders.

Testifying in his own defense, Williams agreed with Cruse: (1) that Williams was the one who suggested robbing persons at the store; (2) that Williams was the first one to shoot Mr. Keller and that Cruse was the first one to shoot Mrs. Keller; and (3) that it was Williams's idea to burn the Keller house. However, Williams (1) denied that he raped Mrs. Keller, (2) claimed that Cruse fired all the subsequent shots into the Kellers' bodies, and (3) contradicted other details of Cruse's testimony about who had suggested some of their activities during and after the murders.

Lisa C. Schiermeier, a serologist, tested the seminal fluid recovered from Mrs. Keller's vagina as a part of the Physical Evidence Recovery Kit prepared by Dr. Deborah Kay, an assistant chief medical examiner who performed the autopsy on Mrs. Keller. Schiermeier compared that sample with the blood types of Cruse, Williams, and Mr. Keller. Schiermeier testified that her comparison indicated only Williams could have contributed a certain type of seminal fluid found in the

sample. Dr. George C. Li, a DNA expert who performed a DNA test on the spermatozoa from the sample, testified that his test results were consistent with a conclusion that Cruse and Williams jointly contributed the seminal fluid.

Williams v. Commonwealth, 248 Va. 528, 533-35 (Va. 1994).

II. PROCEDURAL HISTORY

On June 29, 1993, in the Circuit Court of Cumberland County, Virginia, Michael Wayne Williams ("Williams") was charged in twelve separate indictments for the capital murder, robbery, rape, and abduction of Mary Keller; for the capital murder, robbery, and abduction of Morris Keller; for capital murder based on two related homicides; for statutory burglary; and for arson. Jeffrey Allan Cruse ("Cruse") was also indicted for the same offenses. Several months earlier, Williams was arrested and indicted on four homicides which had occurred in Prince Edward County on December 24, 1992. Williams pled not guilty to each of the charges.

Williams was subsequently tried by a jury which found him guilty on all counts. On the non-capital charges, the jury fixed Williams' punishment at life imprisonment for the rape, 50 years and a $100,000 fine for the arson, 40 years for each of the robberies, 20 years for the burglary, and 10 years for each of the abductions. On January 7, 1994, the jury recommended that

Williams be sentenced to death for the capital murders of both Mr. and Mrs. Keller, finding that both statutory aggravators of "future dangerousness" and "vileness" existed. The trial judge subsequently adopted the jury's recommendation and sentenced Williams to death on February 22, 1994.

On November 4, 1994, the Virginia Supreme Court upheld Williams' capital murder convictions and death sentences in Williams v. Commonwealth, 248 Va. 528 (1994). Williams' request for a rehearing was denied on January 13, 1995. On June 26, 1995, the U.S. Supreme Court denied his petition for a writ of certiorari. See Williams v. Virginia, 113 S. Ct. 1880 (1995). Williams subsequently filed a petition for a writ of habeas corpus in state post-conviction proceedings.

On August 30, 1995, Williams filed his initial state habeas petition. From December 1995 to January 1996, counsel for Williams also filed motions for expert assistance and discovery. On January 29, 1996, after receiving leave to amend, Williams filed an amended state habeas petition. The Virginia Supreme Court dismissed Williams' petition without hearing or oral argument and denied all motions for expert services and discovery on March 18, 1996. The U.S. Supreme Court again denied certiorari on October 7, 1996. See Williams v. Netherland, 117

S. Ct. 200 (1996).

On July 2, 1996, this Court granted Williams' motion for appointment of counsel and stay of execution, then scheduled for July 11, 1996. By Order entered on August 13, 1996, this Court directed Williams to file his federal habeas petition within 180 days of April 24, 1996. The Court subsequently granted Williams' request for a 30-day extension. Williams filed his federal habeas petition on November 20, 1996.

III. CLAIMS PRESENTED

In his federal habeas petition Williams attacks his conviction and sentence on the following grounds:

I. Juror Misconduct Violated Williams' Rights to an Impartial Jury and to Due Process of Law

   A. Juror Stinnett

   B. Juror Blanton

   C. The Jurors Improperly Considered Parole Eligibility During the Sentencing Deliberations

II. The Evidence Was Insufficient as a Matter of Law to Sustain Any Convictions for Capital Murder

   A. The Evidence Did Not Establish that Williams Was the Triggerman

   B. The Predicate Felonies Were Not Part of the Murders

III. The Trial Court Denied Williams a Fair Trial and Sentencing

   A. Guilt Phase

      1. The Trial Court Gave an Erroneous Instruction on Capital Murder and Relieved the Commonwealth of Its Burden to Prove the Elements of Capital Murder

      2. The Trial Court Did Not Properly Perform or Permit a "Life-Qualification" of the Jury

         a. Jurors Trent and Holman

         b. Juror Bernard

         c. Juror Davis

         d. Jury Predisposed to Impose Death

      3. The Trial Court Erred When It Refused to Permit In-Depth, Individual Questioning Regarding Pre-Trial Publicity

      4. The Trial Court Denied Williams a Fair Trial By Refusing His Request For Appointment of an Investigator

      5. A Mistrial Should Have Been Declared After Verena James Referred to the "Rice Fires" During the Guilt Phase of Trial

      6. The Trial Court Erred in Allowing the Commonwealth's Attorney to Improperly Bolster the Testimony of Cruse

      7. The Trial Court Erred in Admitting Into Evidence Numerous Photographs of the Victims

      8. Williams' Constitutional Right to be Present at Trial and to Confront His Witnesses Should Not Have Been the Subject of Impeachmen

B. Sentencing Phase

1. The Trial Court Erred in Not Declaring a Mistrial or Not Giving Cautionary Instructions After Improper and Inflammatory Closing Argument by the Commonwealth at the Sentencing Phase

2. Williams Was Not Provided With Appropriate Discovery to Rebut the Commonwealth's Case on Vileness and Future Dangerousness

3. The Court Erred in Denying a Jury Instruction Concerning the Meaning Life Sentence and Williams' Mandatory 30 Year Parole Ineligibility

4. The Trial Court Erred in Permitting the Mother of the Victim to Testify at the Sentencing Phase

5. The Trial Court Erred When Admitting Evidence of Unadjudicated Criminal Acts in the Sentencing Phase of the Trial

6. The Trial Court Erred in Admitting Evidence of Unadjudicated Criminal Conduct Without Setting a Standard of Proof

7. The Trial Court Erred in Admitting Photographs of the Prince Edward Homicides

8. The Trial Court Erred in Permitting Cross-Examination of Williams' Mother That Exceeded the Scope of Direct Examination

9. The Trial Court Erred in Restricting the Testimony of Williams' Mitigation Expert and Barring Testimony Explicitly Permitted Under the Statute

10. The Trial Court Erred With Instructing the Jury at the Sentencing Phase and in Failing

to Instruct on Mitigation and Mitigating Evidence

11. The Trial Court's Sentencing Instructions Were Constitutionally Deficient

IV. Prosecutorial Misconduct Deprived Williams of a Fair Trial and Due Process

A. Guilt Phase

1. The Commonwealth Failed to Disclose Its Agreement With the Chief Prosecution Witness, Cruse, and Actively Misled the Jury Regarding An Agreement With Cruse

2. The Commonwealth Failed to Disclose a Psychiatric Evaluation of Cruse Containing Brady Information

3. The Commonwealth Allowed Cruse, Williams' Co-Defendant, to Misrepresent his Cooperation and Contacts With the Commonwealth Prior to Williams' Trial

4. The Commonwealth Presented Improper Opening and Closing Arguments

5. The Commonwealth Failed to Reveal at Voir Dire That Stinnett's Former Husband Would be a Trial Witness and That She Had Failed To Reveal Their Relationship to the Court and Counsel

B. Sentencing Phase

1. The Prosecutor Acting Improperly When Objecting to Dr. Cornell's Testimony About Mitigation Factors Properly Before the Jury

2. The Prosecutor Engaged in Improper and Prejudicial Argument During the Sentencing Phase

V. Williams Did Not Receive Effective Assistance of Counsel

A. Guilt Phase

1. Counsel was Ineffective in Failing to Object to Improper Instructions Regarding the Triggerman Rule and the Degrees of Murder

2. Counsel Did Not Effectively Investigate or Confront the Petitioner's Co-Defendant, Jeffrey Alan Cruse, or the Issue of Cruse's Plea Agreement With the Commonwealth

3. Trial Counsel Failed to Investigate, Develop and Present Evidence of Voluntary Intoxication as a Defense and to Impeach the Prosecution's Key Witness

   a. Intoxication as a Defense

   b. Intoxication to Impeach the Prosecution's Key Witness

4. Counsel was Ineffective in Failing to Object to the Court's Deficient Preliminary Instruction and Jury Charge on the Burden of Proof

5. Petitioner's Counsel Were Ineffective on Voir Dire and Compounded The Trial Court's Error

   a. Counsel Failed to Adequately Protect Williams' Right to Life Qualification Questions

      i. Juror Trent

      ii. Juror Holman

      iii. Juror Bernard

   b. Counsel Failed to Challenge Prospective Juror Stinnett for Cause

   c. Counsel Failed to Conduct Extensive Voir Dire on the Issue of Pretrial Publicity

6. Trial Counsel Were Ineffective in Seeking Court Appointment of an Investigator

7. Counsel was Ineffective in Failing to Promptly Stipulate to the Testimony of Family Members Regarding Identification and Ownership of Property Stolen From the Victims

8. Counsel Failed to Protect Williams' Rights When Counsel Failed to Offer When a Single Objection to Improper Prosecutorial Comments

9. Counsel was Ineffective in Failing to Object to Numerous Improper and Misleading Statements by the Commonwealth in Opening and Closing Arguments During the Guilt/Innocence Phase of the Trial

B. Sentencing Phase

1. Counsel Failed to Object to Testimony From the Victim's Mother

2. Counsel Failed to Make a Timely Objection to Photographs of the Prince Edward Victims and to Properly Argue the Objection

3. Counsel Failed to Develop Defense Evidence and Mitigation Evidence Through the Medical Examiner

4. Counsel Failed to Develop Defense Evidence and Mitigation Through Williams' Brother

5. Counsel Failed to Object to Cross Examination on Williams' Arrest at the Penalty Phase

6. Counsel Failed to Present Evidence of Intoxication and Drug Use

7. Counsel Failed to Protect the Testimony of Their Expert Witness During Objections and Interruptions by the Prosecutor and Court

8. Counsel Failed to Request an Evaluation by a Neuropsychologist

9. Counsel Failed to Present Williams' Testimony at the Sentencing Phase

10. Counsel Failed to Object to a Deficient Instruction on Mitigation and Failed to Request a Corrective Mitigation Instruction

11. Counsel Failed to Object to Improper, Inflammatory and Prejudicial Argument and Failed to Request a Curative Instruction

12. Counsel Present Ineffective Argument at the Penalty Phase

C. Ineffective Assistance on Appeal

1. Failure to Appeal Denied Jury Instructions

2. Counsel Failed to Properly Appeal the Trial Court's Erroneous Restriction of Voir Dire and Violations of Witherspoon-Witt

3. Counsel Failed to Appeal the Trial Court's Failure to Remove Gary Davis in the Same Manner as the Removal Was Objected to at the Trial Court Level

VI. Williams Was Not Provided With the Effective Assistance of a Mental Health Expert Guaranteed Under Ake v. Oklahoma, 470 U.S. 68 (1985)

VII. Additional Constitutional Errors

A. Virginia's Death Penalty Statutes Are Unconstitutional as They Fail to Provide Guidance on the Meaning and Use of Mitigating Evidence

B. Virginia's Death Penalty Statutes Are Unconstitutionally Vague as They Fail to Provide the Sentencer With Sufficient Guidance to Assure that the Death Penalty is Not Imposed in an Arbitrary and Capricious Manner

C. Virginia's "Vileness" Factor, as Applied, Unconstitutionally Denies Defendant Notice and Meaningful Opportunity to be Heard

D. The "Future Dangerousness" Aggravating Factor is Unconstitutionally Vague and Inherently Misleading as it Asks Jurors to Find a Probability Beyond a Reasonable Doubt

E. Section 19.2-264.4(c), Which Allows The Sentencer to Find "Future Dangerousness" Based on Unadjudicated Criminal Conduct, Violates The Sixth, Eighth and Fourteenth Amendments

F. The "Future Dangerousness" Aggravating Factor is Inherently Unreliable and is Insufficient to Guide Jury Discretion

G. Imposition of the Death Penalty in Virginia is Arbitrary Because of the Failure of the Supreme Court of Virginia to Engage in Meaningful or Fair Appellate Review

H. Virginia's Contemporaneous Objection Rule is Unconstitutional as Applied

I. Imposition of the Death Penalty Violates the Eighth and Fourteenth Amendments Since it Constitutes Cruel and Unusual Punishment

IV. THE APPLICABILITY OF THE 1996 ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

On April 24, 1996, before Williams filed his federal habeas petition, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the "Act"), became effective. Title I of the Act, entitled "Habeas Corpus Reform," substantially alters the substantive law governing habeas corpus petitions. Sections 101 to 106 of the Act modify pre-existing habeas corpus procedures contained in Chapter 153 of the Judicial Code, 28 U.S.C. §§ 2241-2255. Section 107(a) of the Act enacts a new Chapter 154, 28 U.S.C. §§ 2261-2266, which applies to habeas petitions in capital cases.

This Court has previously held that the new Act did not apply because Virginia had not satisfied the "opt-in" requirements of § 107(a) and applying Chapter 153 violated retroactivity principles. See Strickler v. Netherland No. 3:95cv924 (E.D. Va. 1996); Saunders v. Angelone, No.3:95cv620 (E.D. Va. 1996). Respondent urges the Court to reconsider its prior ruling, arguing that the procedural posture of Williams' case differs significantly from that of Strickler and Saunders. In both those cases, petitioners filed their federal habeas petitions before the Act was enacted, and had entered state

habeas proceedings before the Virginia General Assembly passed their July 1995 amendments. Williams, however, filed his state habeas petition after July 1995 and then filed his federal habeas petition in November 1996--seven months after the Act's enactment. The legal landscape governing Williams' petition has clearly changed since Strickler and Saunders.

A. Chapter 154: New Habeas Corpus Provisions

Section 107(a) of the Act, codified at Chapter 154, 28 U.S.C. §§ 2261-2266, essentially offers a system of expedited review and other "benefits" to states that qualify under either of two "opt-in" procedures: (1) the "post-conviction" procedure provided by 28 U.S.C. § 2261; or (2) the "unitary review" procedure provided by 28 U.S.C. § 2265. As this Court found in Strickler, the Fourth Circuit requires courts to analyze federal habeas petitions under § 107 of the Act because that section specifically states that the Act "shall apply to cases pending on or after the date of enactment of this Act." § 107(c); see Bennett v. Angelone, 92 F.3d 1336, 1342 (4th Cir. 1996), cert. denied, 117 S. Ct. 503 (1996). Section 107 applies, however, only if Virginia satisfies the "opt-in" requirements. Since Virginia does not have a unitary review procedure, the Court must therefore analyze whether Virginia meets the post-conviction

review procedures and thus, qualifies as an opt-in state.

1. The "Opt-In" Requirements

To qualify as an opt-in state, a state must meet all four of the following criteria:

(1) The State must establish by statute, rule of its court of last resort, or other agency authorized by state law, a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. See § 2261(b).

(2) Such mechanism must provide standards of competency for the appointment of such counsel. See § 2261(b).

(3) Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. See § 2261(c).

(4) Such mechanism must provide for an entry of a court order either appointing counsel to each capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. See § 2261(c).

2. Has Virginia Satisfied the Opt-In Requirements?

Since July 1, 1992, Virginia has required the appointment of counsel for post-conviction capital cases under Va. Code § 19.2-163.7. While the Fourth Circuit has not considered whether this appointment mechanism satisfies the requirements of Chapter 154, this Court finds that the automatic appointment of counsel for indigent defendants does meet the first opt-in criterion.

Virginia, however, still fails to reap the benefits of

Chapter 154 because it has not provided a mechanism for the compensation and payment of such counsel as required by the Act. While Virginia substantially complies with the law via the appropriations acts of the General Assembly that provide for the payment of such counsel, it has not specifically established a "mechanism" for payment as required by the Act. The Fourth Circuit recently noted that "the Virginia statutes and regulations do not specifically provide for the compensation or payment of litigation expenses of appointed counsel, as § 107 requires." Bennett v. Angelone, 92 F.3d 1336, 1342 n.2 (4th Cir. 1996), cert. denied, 117 S. Ct. 503 (1996). This same conclusion was reached by the Court in Satcher v. Netherland, 944 F. Supp. 1222 (E.D. Va. 1996), aff'd in part and rev'd in part on other grounds, 126 F.3d 561 (4th Cir. 1997).

As the Court in Satcher noted, "[i]f Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so." Id. at 1242. Congress instead chose to confer such benefits to those states that have made a formal commitment to providing a post-conviction review system which would protect capital litigants' constitutional rights. Id. This Court agrees with this analysis

and finds that Virginia's system for compensation and payment of expenses still fails to meet the standards established by § 107.[1] Thus, Virginia does not qualify as an opt-in state because it fails to adhere to the formal requirements of § 2261. Accordingly, Chapter 154 does not apply to Williams' federal habeas petition.

B. Chapter 153 Amendments

Chapter 153 of the Act, §§ 101-106, effects a number of procedural changes to previous habeas corpus statutes codified in Chapter 153. Of particular relevance to Williams' petition is § 104 which substantively changes the standards of review under 28 U.S.C. § 2254.[2] Furthermore, unlike Chapter 154, the Chapter 153 amendments are not made explicitly applicable to petitions pending when the Act took effect. The U.S. Supreme Court in Lindh v. Murphy, 117 S. Ct. 2059 (1997), recently held that the

[1] The Court is aware that the amended Va. Code § 19.2-163, effective July 1998, does provide for such a compensation and payment mechanism. This amendment, however, was not in effect at the time Williams filed his federal habeas petition.

[2] Specifically, § 104 limits the grounds on which petitions may be granted (28 U.S.C. § 2254(d)), requires greater deference to state court findings of fact (28 U.S.C. § 2254(e)(1)), limits the availability of evidentiary hearings in a habeas court (28 U.S.C. § 2254(e)(2)), and eliminates ineffectiveness or incompetence of post-conviction counsel as a ground for relief under 28 U.S.C. § 2254 (28 U.S.C. § 2254(i)).

amendments do not apply to habeas corpus cases that were pending when the Act took effect, thereby resolving a split among the circuits. Applying the amendments to these pending cases, the U.S. Supreme Court held, violates principles against retroactive application of laws. See Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994). The U.S. Supreme Court expressly found that "the amendments to chapter 153 [apply] only to such cases as were filed after the statute's enactment." Lindh, 117 S. Ct. at 2062.

Williams attempts to place his federal habeas petition in this "pending" box by arguing that he filed a state habeas petition before the Act's enactment and therefore, applying the amendments to his federal habeas petition would trigger Landgraf's retroactive effect. Indeed, if his federal habeas petition were pending when the Act took effect, this Court could not apply the Chapter 153 amendments pursuant to Lindh. Williams, however, filed his federal habeas petition in November 1996. His strained argument--that the amendments would have an impermissible retroactive effect on his federal habeas petition merely because he went through state post-conviction proceedings with the assumption that he would enter federal review under the old 28 U.S.C. § 2254--is contrary to the U.S. Supreme Court's directive in Lindh. Therefore, the Chapter 153 amendments

enacted seven months before Williams filed his federal habeas petition will govern his claim.

V. EXHAUSTION AND PROCEDURAL DEFAULT

This Court's review of Williams' federal habeas petition is restricted to an inquiry of whether his confinement and sentence are in violation of federal constitutional or statutory law. See 28 U.S.C. § 2241(c)(3). Before this Court can reach the merits of any claim, however, Williams must demonstrate that he has exhausted all state court remedies. See Rose v. Lundy, 455 U.S. 509 (1982). This requirement is strictly enforced in the interest of giving the state courts the first opportunity to consider any alleged errors. See id.

A state court has not been given a full opportunity to rule on a claim unless it has been presented before the state's highest court. See Brown v. Allen, 344 U.S. 443 (1953). In presenting a claim to the state court, the petitioner must "fairly present" claims cognizable under federal law. See Picard v. Connor, 404 U.S. 270 (1971). That is, in order to exhaust a federal claim for purposes of federal habeas corpus review, a petitioner cannot simply raise the claim in state court, citing state law, even if the state claim is analytically similar to a federal claim. See Anderson v. Harless, 459 U.S. 4 (1982);

Duncan v. Henry, 513 U.S. 364 (1995) (presentation of a "miscarriage of justice" claim under California law was not the same as an allegation of a violation of federal due process).

Furthermore, Williams is not entitled to federal review of claims which are procedurally defaulted. These include claims defaulted under an independent and adequate state procedural rule, Coleman v. Thompson, 501 U.S. 722, 750 (1992), and claims never presented to a state court, Gray v. Netherland, 116 S. Ct. 2074, 2080-81 (1996). In Virginia, no writ of habeas will be granted on the basis of any legal or factual claim which the petitioner previously could have made, but did not. See Gray, 116 S. Ct. at 2080; Slayton v. Parrigan, 215 Va. 27 (1974), cert. denied, 419 U.S. 1108 (1975). In order to overcome this procedural bar, the petitioner must demonstrate good cause for his failure to preserve the issue and prejudice resulting from the constitutional violation, Gray, 116 S. Ct. at 2080, or that there has been a fundamental miscarriage of justice, Coleman, 501 U.S. at 750.

In this case, Williams raised several of the present claims in his petition for a writ of habeas corpus before the Virginia Supreme Court. His remaining claims are exhausted because they were never raised in state court and could not be raised in state

court now. See Va. Code Ann. §§ 801.654(B)(2) and 801.654-1.

A. Defaulted Claims[3]

1. Cause and Prejudice Analysis

The U.S. Supreme Court has recognized at least three categories of "cause" which are sufficient to overcome a state procedural default: (1) counsel's inability to know of a legal or factual issue; (2) interference by the prosecution with the habeas petition; and (3) ineffective assistance of counsel. See Murray v. Carrier, 477 U.S. 478 (1986). In addition, a federal court may grant habeas relief in the "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey v. Zant, 499 U.S. 467, 494 (1991).

2. Claims Barred under Slayton v. Parrigan

The Virginia Supreme Court ruled that several of Williams' state habeas claims were defaulted under Slayton v. Parrigan, 215 Va. 27 (1974), cert. denied, 419 U.S. 1108 (1975). Under the rule in Slayton, state habeas review is barred by the failure to raise an issue at trial and on direct appeal. Id. Slayton is a

[3] Williams has numbered the claims in his federal habeas petition differently than in his state habeas petition. To avoid confusion, the Court will refer to the numbers designated in Williams' federal habeas petition.

well-recognized bar to federal review. See Spencer v. Murray, 18 F.3d 229, 232 (4th Cir. 1994).

As a preliminary matter, Williams asserts that the Virginia Supreme Court mistakenly applied Slayton to Claims III(A)(5), III(A)(6), III(A)(7), and III(B)(11) because he raised those claims at trial and on direct appeal. A review of the record confirms that contention. Respondent correctly notes, however, that Williams did not raise these claims on federal constitutional grounds; rather, Williams solely argued matters of state law. Having failed to "fairly present" these claims as federal constitutional claims before the state's highest court, Williams cannot now "federalize" Claims III(A)(5), III(A)(6), and III(A)(7) for purposes of federal habeas review. See Picard v. Connor, 404 U.S. 270 (1971). As for Claim III(B)(11), the Virginia Supreme Court expressly ruled that it was procedurally defaulted under its Rule 5:25. Accordingly, because Williams has failed to show "cause" for the default of these claims, this Court is precluded from further reviewing Claims III(A)(5), III(A)(6), III(A)(7), and III(B)(11).

Williams can revive the remaining claims barred under Slayton if he can demonstrate cause and prejudice, or that there has been a fundamental miscarriage of justice. Williams asserts

ineffective assistance of counsel as "cause" for these defaulted claims.[4] Because it is also the freestanding theory advanced in Claim V, it is discussed as part of the general discussion in Claim V. As noted below, this Court has determined that the ineffective assistance of counsel claims set forth by Williams in Claim V are meritless. Accordingly, Williams cannot establish "cause" for the Slayton procedural default. See infra at 56-94. This Court is therefore precluded from reviewing Claims III(A)(1), III(A)(2)(a)-(c), III(A)(4), III(A)(5), III(A)(6), III(A)(7), III(B)(1), III(B)(4), III(B)(7), III(B)(8), III(B)(9), III(B)(10), III(B)(11), IV(A)(3), IV(A)(4), IV(B)(1), IV(B)(2), VI, VII(G),[5] VII(H),[6] VII(I)[7].

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[4] In order to establish "cause" for a procedural default, a claim of ineffective assistance of counsel must have been presented to the state courts as an independent claim. See Murray v. Carrier, 477 U.S. 478, 489 (1986) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)). In other words, an assertion of ineffective assistance of counsel cannot constitute "cause" excusing a procedural default where the underlying allegation of ineffectiveness is itself procedurally barred. See Justus v. Murray, 897 F.2d 709 (4th Cir. 1990).

[5] To the extent Williams relies on the prosecutor's closing arguments.

[6] Williams concedes that this claim is procedurally defaulted. See Pet'r Opp'n at 79.

[7] To the extent Williams relies on the length of time he will spend on death row.

3. Claims Never Presented in State Court

Williams failed to present the following claims at the state court level: I(A), I(C), III(A)(2)(b),[8] III(A)(2)(d),[9] III(A)(3), IV(A)(2), IV(A)(5), V(A)(3)(b),[10] V(A)(5)(b),[11] V(C)(1),[12] V(C)(2),[13] VII(A),[14] and VII(H)[15]. Despite this procedural bar, these defaulted claims will be revived for purposes of federal habeas review if Williams can show (1) cause for, and prejudice from, the default; or (2) the existence of a fundamental miscarriage of justice.

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[8] This claim is barred under Slayton. See infra at 23-24.

[9] Williams argues that Respondent has misconceptualized his argument that the trial court seated a jury predisposed to impose a death sentence in violation of Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). See Pet'r Opp'n at 22. Williams asserts that he has never argued this claim independent of his claims regarding Jurors Trent, Holman, and Davis. Thus, it is a mischaracterization to state that it was never raised in state court proceedings and it should therefore not be dismissed separately.

[10] See infra at 64.

[11] See infra at 67-68.

[12] Respondent concedes that this claim was raised in Williams' state habeas petition. See Resp't Reply at 26.

[13] Respondent concedes that this claim was raised in Williams' state habeas petition. See Resp't Reply at 26.

[14] See infra at 43.

[15] See supra note 6.

Claims I(A) and IV(A)(5)

Williams claims that his constitutional rights to be tried by an impartial jury and to be tried based only on the evidence presented at trial were violated by the presence of Juror Stinnett on the jury. Juror Stinnett's former husband was Deputy Sheriff Claude B. Meinhard, the detective who interviewed Cruse about the murders and who testified for the Commonwealth. Furthermore, the prosecutor, Robert G. Woodson, Jr., had represented Deputy Meinhard during his divorce. Although asked on voir dire whether she was related to any of the witnesses or if she or any family member had ever been represented by any of the attorneys involved in the case, Juror Stinnettt never revealed her former marriage to Deputy Meinhard or that they had four children together. Prosecutor Woodson never mentioned his representation of Deputy Meinhard either. As a result, Williams argues that defense counsel could not conduct meaningful voir dire and could not intelligently exercise their peremptory challenges or challenges for cause. Thus, Williams contends that he was deprived of a fair trial under United States v. Bynum 634 F.2d 768, 771 (4th Cir. 1980).

In response, Respondent argues that Williams has procedurally defaulted these claims because he failed to raise

them on state habeas. Moreover, even if Williams could surmount the "cause" hurdle, he has failed to demonstrate "prejudice." Juror Stinnett divorced Deputy Meinhard fifteen years prior to the trial, and Deputy Meinhard was an insignificant witness for the Commonwealth. Indeed, Respondent points out that the defense did not cross-examine Deputy Meinhard, and his credibility was never at issue.

Irrespective of Deputy Meinhard's importance as a witness, however, if Williams can demonstrate "cause" for the procedural default, he will have automatically demonstrated "prejudice" under Bynum. In Bynum, the Fourth Circuit reversed a conviction because a juror, when asked whether he had a relative or close friend who had been either a defendant or victim of a crime, failed to reveal his brother's existence as a convicted felon. In so holding, the Fourth Circuit stated:

> Certainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness of a potential juror's answers on *voir dire*, the result is deprivation of the defendant's rights to a fair trial. [The juror] by his concealment impaired the right of [the defendant] to exercise intelligently a peremptory challenge to remove a juror who was suspected of being partial.

Bynum, 634 F.2d at 771 (footnotes omitted); see also United States v. Brown, 799 F.2d 134 (4th Cir. 1986) (voir dire that has

the effect of impairing the defendant's ability to meaningfully and intelligently exercise his challenges is grounds for reversal).

Like the juror in Bynum, Juror Stinnett deliberately failed to tell the truth on voir dire.

> COURT: Have you or any member of your immediate family ever been represented by [Mr. Woodson]?
>
> JURORS: (Two [Stinnettt and Carter] have no affirmative response.)

Tr. 1-3-94 at 116.

> COURT: Are any of you involved in law enforcement?
>
> JURORS: (No affirmative response.)
>
> COURT: Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard . . . ?
>
> JURORS: (No affirmative response.)

Id. at 123-24. Like the juror in Bynum, Juror Stinnett's intentional nondisclosure on voir dire gives rise to a presumption of actual bias. Assuming that Prosecutor Woodson knew of Juror Stinnett's relationship to Deputy Meinhard based on his representation of Deputy Meinhard in the divorce, his subsequent failure to advise the court or defense counsel of Juror Stinnett's dishonesty had a substantial and injurious

effect on Williams' ability to select impartial jurors.

Although Respondent argues that Williams has failed to demonstrate "cause," the Court disagrees. There is no evidence that Williams' defense or state habeas counsel knew or could have known of Juror Stinnett's relationship to Deputy Meinhard absent disclosure by the prosecutor. Because Prosecutor Woodson never notified the court or defense counsel of his prior representation of Deputy Meinhard or of his knowledge of Deputy Meinhard's relationship to Juror Stinnett, the Court finds that this information was not reasonably available to defense counsel and that they were unable to know of this issue. Accordingly, the Court will grant an evidentiary hearing on these allegations of juror and prosecutorial misconduct. The motion to dismiss this claim will be denied.

Claim I(C)

Williams argues that three jurors improperly considered his parole eligibility during the sentencing phase of his trial--specifically, the jurors reported that they believed Williams would be released after 33 years if given a life sentence. Williams now argues that the jurors' consideration of this extrajudicial evidence violated his right to be convicted solely on evidence introduced in open court. See Smith v. Phillips, 455

U.S. 209, 217 (1982).

The Court will dismiss this claim because it is procedurally defaulted. Even if Williams could demonstrate "cause," he has failed to show that the jurors' internal discussion prejudiced him. Such evidence is inadmissible under Rule 606(b) of the Federal Rules of Evidence, and Williams has failed to prove that the jury's internal discussion of parole constitutes impermissible "extrajudicial" evidence to circumvent Rule 606(b)'s bar.

Claim III(A)(3)

Williams argues that the trial court erred when it refused to permit in-depth individual questioning on voir dire regarding pretrial publicity. Respondent asserts that this claim is procedurally defaulted because Williams failed to raise it in state court. Because Williams offers no "cause" for the default, the Court will dismiss this claim.

Claim IV(A)(2)

In September 1993, while incarcerated for the Keller murders, Cruse was evaluated by a psychiatrist who reported that "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time." Pet'r Ex. D. Despite being ordered to

disclose all Brady material, the Commonwealth failed to provide this report to Williams' defense counsel. Williams now argues that this violation substantially impaired his ability to cross-examine and impeach Cruse.

The prejudice resulting from the Commonwealth's failure to comply with its Brady obligations is clear. As noted in the discussion of Claim IV(A)(1), Cruse played a critical role in the Commonwealth's case against Williams. Because both defendants offered drastically different versions of the shootings, Cruse's testimony on the triggerman issue and his credibility as a witness determined who would be convicted of capital murder. Information that Cruse had little to no recollection of the murders would have undoubtedly undermined his credibility and cast doubt on his ability to remember the shootings with such detail.

Irrespective of this showing of "prejudice," Respondent argues that this claim is procedurally defaulted because Williams has failed to demonstrate why this claim could not have been discovered with due diligence in time to be raised in state court. The Fourth Circuit has held that "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a

defendant is not entitled to the benefit of the Brady doctrine." Hoke v. Netherland, 92 F.3d 1350, 1355 (4th Cir.) (citation omitted), cert. denied, 117 S. Ct. 630 (1996).

Although defense counsel were entitled to rely on the belief that the prosecution would comply with the Constitution and thus produce all Brady material upon request,[16] Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded the same type of assistance at both state and federal habeas--namely, court-appointed attorneys. The Court cannot discern any reason and has been offered no explanation why state habeas counsel failed to discover the report and present it in state habeas proceedings. Accordingly, the Court will dismiss this claim.

VI. CLAIMS ADDRESSED ON THE MERITS

A. Applicable Law

1. Standard of Review

Under the recently revised Title 28 United States Code Section 2254, a federal court may not grant a writ of habeas

[16] See Dobbs v. Zant, 113 S. Ct. 835, 836 (1993).

corpus based on any claim that was adjudicated on the merits in state court unless the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Although this new standard requires more deference to state court findings, it is not a complete abdication of the federal court's duty to provide meaningful review.

2. Harmless Error

Federal habeas courts routinely conduct harmless error analysis of errors occurring in capital cases. See, e.g., Cabana v. Bullock, 474 U.S. 376, 391 n.6 (1986); Smith v. Dixon, 14 F.3d 956, 978 (4th Cir.) (en banc), cert. denied, 513 U.S. 841 (1994). In federal habeas corpus proceedings, an error is deemed harmful only if it "had substantial and injurious effect or influence in determining the jury's verdict." Chapman v. California, 386 U.S. 18, 24 (1967) (citing Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quotation omitted)).

3. New Rule Doctrine

Where a federal habeas petitioner seeks relief by application of a constitutional rule, the Court must examine the rule to determine whether it had been announced at the time the petitioner's conviction became final or whether the petitioner is seeking an extension of longstanding precedent. As a general matter, federal courts may not grant state prisoners relief in collateral proceedings if to do so would create a "new rule" of constitutional law, subject to two narrow exceptions.[17] See Teague v. Lane, 489 U.S. 288 (1989). Since Teague, the U.S. Supreme Court has articulated the test to determine whether a rule is a "new rule" such that it should not be applied retroactively:

> Though we have offered various formulations of what constitutes a new rule, put "meaningfully for the majority of cases, a decision announces a new rule 'if the result was not dictated by precedent existing at the time the defendant's conviction became final.'"

Gilmore v. Taylor, 508 U.S. 333, 340 (1993) (citation omitted).

[17] Under Teague, a "new rule" should be applied retroactively if (1) it "plac[es] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) it is a "watershed rule[] of criminal procedure," implicating the fundamental fairness and accuracy of the criminal proceeding. Teague v. Lane, 489 U.S. 288, 311 (1989).

Where the petitioner requests the Court not to apply a rule announced after his conviction became final, but to adopt a rule not previously announced, the Court must first determine whether such a rule would be retroactively applied if adopted. If the court determines that the rule, if adopted, would not be retroactively applied, then the Court should dismiss the claim without reaching the merits. See Penry v. Lynaugh, 492 U.S. 302 (1989). Under Teague, a court faced with this situation should proceed in three steps. First, the Court must ascertain the date on which the conviction and sentence became final. Second, the Court must determine whether a state court considering the defendant's claim on that date would have felt compelled by existing precedent to conclude that the rule sought by the petitioner was required by the Constitution. Third, even if the Court determines that the petitioner seeks the benefit of a new rule, the Court must decide whether the rule falls into one of the two Teague exceptions. See Caspari v. Bohlen, 510 U.S. 383, 389 (1994).

Even if the Court determines that the petitioner does not seek to apply or adopt a "new rule", the Court must still "inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting,

thereby extending the precedent." Stringer v. Black, 503 U.S. 222, 228 (1992). The Court should be mindful, however, that the "new rule" doctrine is not necessarily implicated every time the Court applies an established standard to a new set of facts. See id.

B. Claims Barred Under Hawks v. Cox

The Virginia Supreme Court ruled that Claims II(A), III(A)(8), III(B)(3), III(B)(5), III(B)(6), VII(A), VII(B), VII(C), VII(D), VII(E), VII(F), VII(G), and VII(I) were barred under the rule in Hawks v. Cox, 211 Va. 91 (1970). "Hawks, however, is not a true procedural default rule. . . . Hawks cannot prevent federal habeas review of federal constitutional claims properly raised on direct appeal." Turner v. Williams, 35 F.3d 872, 890 (4th Cir. 1994) (citation omitted), overruled on other grounds, O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996). Therefore, the Court must determine whether Williams raised the aforementioned claims on direct appeal.

A review of the record indicates that Williams did present the claims, albeit more general versions, on direct appeal of his conviction. The record further discloses that the Virginia Supreme Court adjudicated those claims on the merits. Although this Court has reviewed the aforementioned claims, it may only

grant relief in limited circumstances. See 28 U.S.C. § 2254(d). As demonstrated below, none of the statutory exceptions apply and the Court will not grant relief as to these claims.

Claim II(A)

Williams argues that the evidence adduced at trial was insufficient to establish beyond a reasonable doubt that he was the "triggerman." Under Virginia law, only the immediate perpetrator of a murder may be convicted of capital murder and only after being found beyond a reasonable doubt to be the triggerman who fired the fatal shot. See Va. Code § 18.2-18; Johnson v. Commonwealth, 220 Va. 146, 150 (1979), cert. denied, 454 U.S. 920 (1981). Williams argues that given the facts in his case, it is impossible to determine whether he or Cruse fired the fatal shots. Williams accordingly argues that even if the Court is unwilling to reverse at the guilt stage, he should be granted a new sentencing hearing in order to determine on which capital convictions the jury recommended the death penalty.

In evaluating a claim based on insufficiency of the evidence, the reviewing court must view the evidence in the light most favorable to the prosecution. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). The critical inquiry is "whether the record evidence could reasonably support a finding of guilt

beyond a reasonable doubt." Id. at 318. "But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 318-19.

The evidence at trial painting Williams as the triggerman primarily consisted of the testimony of Cruse. Cruse testified that Williams fired all of the shots that killed Mr. Keller and fired two of the three shots that killed Mrs. Keller. Williams himself admitted to firing the first shot into Mr. Keller's head. While the physical evidence does not directly prove that Williams was the triggerman, Cruse's testimony and Williams' own testimony, when viewed in the light most favorable to the Commonwealth, convincingly demonstrate that Williams played a "direct part in inflicting injuries" and is thus liable for capital murder. See Strickler v. Commonwealth, 241 Va. 482, cert. denied, 502 U.S. 944 (1991). Williams' argument that Cruse fired the first and fatal shot at Mrs. Keller was presented to the jury and the Virginia Supreme Court which found that it did

not have merit in the face of the other testimony linking Williams to the shootings. Simply, the jurors chose to believe Cruse over Williams, and credibility determinations are properly within their province. Thus, after reviewing the evidence in the light most favorable to the prosecution, the Court finds that a rational trier of fact could have found beyond a reasonable doubt that Williams, and not Cruse, was the triggerman.

Claim III(A)(8)

Williams argues that the trial court erred when, over defense counsel's objection, it allowed the prosecutor to impeach Williams' testimony by referring to the fact that Williams was the only witness permitted to stay in the courtroom and thus, hear the testimony of all the other witnesses. Williams contends that this error impermissibly burdened his constitutional right to confront his accusers, to be present at all times during his trial, to present evidence in his favor, and to compel process. Respondent argues, however, that existing case law does not prohibit a prosecutor from commenting in such a manner and that to grant federal collateral relief on this claim would violate the "new rule" doctrine.

A survey of existing case law confirms Respondent's contention. Although Williams argues that Griffin v. California,

380 U.S. 609 (1965) (Fifth Amendment violation to comment on the defendant's failure to take the witness stand), and Brooks v. Tennessee, 406 U.S. 605 (1972) (Fifth Amendment violation to require the defendant to testify first for the defense or not at all), implicitly support his position, the Court finds that the result urged by Williams is not dictated by existing precedent. To hold otherwise would create a "new rule" which this Court is severely restricted from doing under Teague and its progeny.

Although the Court has concerns about the propriety of the prosecutor's comments in this particular case, prosecutorial impeachment of the defendant's testimony through this type of cross-examination has not yet been held violative of the defendant's constitutional rights--notwithstanding Williams' persuasive Brooks argument to the contrary. Although the Court must thus deny Williams relief on this claim, a final point needs to be made. In rejecting this claim on direct appeal, the Virginia Supreme Court stated "[w]e fail to see how [Williams' constitutional] rights are violated by a question that reflected what the jury already knew." Williams, 248 Va. at 544. In Griffin, the U.S. Supreme Court rejected this exact rationale in the context of prosecutorial comment on the defendant's failure to testify:

> What a jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

380 U.S. at 614-15. This Court similarly finds this aspect of the Virginia Supreme Court's justification for dismissing the claim erroneous and unpersuasive.

Claim III(B)(3)

Williams argues that the trial court erred in denying his motion for jury instructions on the meaning of a life sentence and his mandatory 30 year ineligibility for parole. In support of this argument, Williams cites Simmons v. South Carolina, 114 S. Ct. 2187 (1994), wherein the U.S. Supreme Court held that a sentencing jury must be instructed that a capital defendant is ineligible for parole when the prosecution argues "future dangerousness." Recently, however, the U.S. Supreme Court held that Simmons constitutes a "new rule" for purposes of habeas review and thus, cannot be used to overturn a habeas petitioner's death sentence. See O'Dell v. Netherland, 117 S. Ct. 1969 (1997). Accordingly, Williams' claim which seeks "a logical and modest extension" of Simmons is likewise barred under the Teague doctrine.

Claim III(B)(5)

Williams argues that the trial court erred in allowing the prosecutor to present evidence of the unadjudicated Prince Edward County homicides at the penalty stage as proof of "future dangerousness." Courts have uniformly rejected the argument that evidence of prior unadjudicated criminal conduct cannot be considered in assessing "future dangerousness." See, e.g., Eaton v. Angelone, 1998 WL 128570, *9 (4th Cir. 1998) (citing cases); see also Jurek v. Texas, 428 U.S. 262, 276 (1976) (stating that the jury must "have before it all possible relevant information about the individual defendant whose fate it must determine"). Thus, the Virginia Supreme Court's rejection of Williams' claim was not contrary to, or an unreasonable application of, clearly established federal law.

Claim III(B)(6)

Williams argues that not only did the trial court err in allowing evidence of unadjudicated crimes, but that it failed to instruct the jury that such crimes must be proved beyond a reasonable doubt in order to be used in the sentencing determination. This Court has repeatedly rejected claims that Virginia's "future dangerousness" factor is unreliable because it may be proved with evidence of unadjudicated crimes. See, e.g.,

Breard v. Netherland, 949 F. Supp. 1255, 1267 (E.D. Va. 1996) (Williams, J.), aff'd, 134 F.3d 615 (4th Cir. 1998); Pruett v. Thompson, 771 F. Supp. 1428, 1442-43 (E.D. Va. 1991) (Spencer, J.), aff'd, 996 F.2d 1560 (4th Cir.), cert. denied, 510 U.S. 984 (1993); see also Richardson v. Johnson, 864 F.2d 1536, 1541 (11th Cir.) (citing cases), cert. denied, 490 U.S. 1114 (1989). Accordingly, the trial court did not err in refusing to instruct the jury that the unadjudicated Prince Edward County homicides must be proved beyond a reasonable doubt.

Claim VII(A)

Williams argues that the Virginia death penalty statutes are unconstitutional as they fail to provide the jury with any guidance on the meaning and use of mitigation evidence. The Fourth Circuit, however, has routinely rejected the claim that the standard Virginia sentencing instruction does not adequately inform the jury on the issue of mitigation. See, e.g., Buchanan v. Angelone, 103 F.3d 344, 347-48 (4th Cir. 1996) (holding that "Virginia's death penalty scheme survives constitutional scrutiny, despite its 'failure to instruct the jury on statutory mitigating factors'") (citation omitted); Jones v. Murray, 947 F.2d 1106, 1119-20 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992); Clozza v. Murray, 913 F.2d 1092, 1005 (4th Cir. 1990),

cert. denied, 499 U.S. 913 (1991). In light of this precedent, Williams' claim must fail.

Claims VII(B) and VII(C)

Williams argues that the "vileness" aggravating factor is unconstitutionally vague in that it does not define what constitutes "outrageously or wantonly vile, horrible or inhuman [conduct]." Va. Code § 19.2-264.4(C). The Virginia Supreme Court rejected this challenge outright as already addressed and answered by the decision in Mickens v. Commonwealth, 247 Va. 395, 402-403 (1994). The Fourth Circuit has likewise rejected this challenge on numerous occasions. See, e.g., Turner v. Williams, 35 F.3d 872, 891-94 (4th Cir. 1994); Jones v. Murray, 976 F.2d 169, 174 (4th Cir.), cert. denied, 505 U.S. 1245 (1992). The Court rejects Williams' claims for the same reasons.

Claims VII(D), VII(E), and VII(F)

In attacking the "future dangerousness" aggravating factor, Williams argues that it is unconstitutionally vague, misleading, and unreliable and that the use of unadjudicated criminal acts is improper. Fourth Circuit case law holds otherwise. See Spencer v. Murray, 5 F.3d 758, 764-65 (4th Cir. 1993), cert. denied, 510 U.S. 1171 (1994); Giarratano v. Procunier, 891 F.2d 483, 489-90 (4th Cir. 1989), cert. denied, 498 U.S. 881 (1990). Furthermore,

for the reasons stated above with respect to Claims III(B)(5) and III(B)(6), the Court rejects these claims.

Claim VII(G)

Williams claims that the Virginia Supreme Court failed to engage in meaningful or fair appellate review of his case under Va. Code § 17-110.1, which requires the court to ensure that the death penalty was not "imposed under the influence of passion, prejudice or any other arbitrary factor." A review of existing case law reveals, however, that the existence of such a claim has never been recognized or alluded to by the U.S. Supreme Court. See George v. Angelone, 901 F. Supp. 1070, 1090 (E.D. Va. 1995), aff'd, 100 F.3d 353 (4th Cir. 1996), cert. denied, 117 S. Ct. 854 (1997). Accordingly, the Court must dismiss Williams' challenge to the state appellate process as barred by the "new rule" doctrine.

Claim VII(I)

Williams argues that imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Virginia Supreme Court, however, rejected this claim as already answered in Beaver v. Commonwealth, 232 Va. 521, 527, cert. denied, 483 U.S. 1033 (1987). The Fourth Circuit similarly has rejected this argument outright. See Briley v.

Booker, 746 F.2d 225, 227 (4th Cir. 1984). Accordingly, this Court must also reject this claim of constitutional error.

C. Preserved Claims

1. Juror Misconduct

Claim I(B)

Williams asserts that a juror may have introduced extrajudicial evidence to the jury. Specifically, Williams claims that Juror Blanton may have received information from her husband, a Virginia State Trooper, who had previously arrested Williams on unrelated charges. Although the jury was sequestered during the trial, the jurors were allowed to return home after being selected. It is during this brief period of time that Williams believes Juror Blanton learned of his previous arrests from her husband--extrajudicial information which she may have then shared with her fellow jurors.

It is well-settled that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . ." Remmer v. United States, 347 U.S. 227, 229 (1954). In the Fourth Circuit, this presumption of prejudice is established if "there is a reasonable possibility that the jury's verdict was influenced by the

material that improperly came before it." United States v. Barnes, 747 F.2d 246, 250 (4th Cir. 1984) (citations and quotations omitted).

In the instant case, however, Williams has failed to provide any evidence that Juror Blanton's husband told her about the previous arrests or that if factual, Juror Blanton shared this information with the other jurors. This omission is particularly glaring in light of the unrebutted affidavit submitted by Juror Blanton in the state habeas proceedings. See Resp't State Ex. E. In that affidavit, Juror Blanton unequivocally denies Williams' allegations. She states that she answered the trial court's voir dire questions truthfully; she never discussed the case with her husband until the trial concluded; no extrinsic information was communicated to her; and she had no knowledge of Williams' prior record until evidence of it was introduced at trial. See id. Although Williams is correct that the burden is on the government to prove that the jury's exposure to extrajudicial information was harmless, the Court need not reach that issue here because Williams has failed to establish the threshold issue--that extrajudicial information was, in fact, introduced to the jury.

In the absence of any rebuttal evidence, the Court does not find that the Virginia Supreme Court's dismissal of this claim

was contrary to clearly established precedent or the result of an unreasonable determination of the facts. See 28 U.S.C. §§ 2254(d), (e). Accordingly, this claim will be dismissed.

2. Insufficiency of the Evidence

In evaluating a claim based on insufficiency of the evidence, the reviewing court must view the evidence in the light most favorable to the prosecution. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). The critical inquiry is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Id. at 318. "But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 318-19.

Claim II(B)

Williams argues that the evidence adduced at trial was insufficient to establish beyond a reasonable doubt that the robbery and rape were committed sufficiently close in time and place to the shooting of the Kellers to elevate their subsequent

murders to capital murder. Williams asserts that "[t]he rape and robbery had been completed long before the murders occurred." Pet. at 39. The Court finds that this assertion is clearly unsupported by the evidence.

It is undisputed that Williams and Cruse went to the Kellers' house intending to commit robbery. While there, Williams and Cruse ordered the Kellers to remove all their clothes, locked them in closets, searched the house, raped Mrs. Keller, and forced the Kellers to "take a walk" after they had showered and changed into clean clothes. Shortly thereafter, Williams and Cruse killed the Kellers so as to not leave any witnesses. Based on the foregoing, the Court finds that the record amply supports the conclusion that the rape and robbery were sufficiently close in time and place to the murders to be predicate felonies for the capital conviction. Accordingly, this claim must be dismissed.

3. Trial Court Errors

Claim III(B)(2)

Williams claims that the trial court erred when it granted his request for a Bill of Particulars only as to prior unadjudicated acts of criminal conduct on the issue of "future dangerousness." Williams contends that had the trial court

required the Commonwealth to specify before trial the components of the "vileness" aggravator, the Commonwealth would not have mistakenly introduced the photographs of the Prince Edward County victims to prove "vileness" and/or defense counsel would have had the opportunity to file a motion in limine in order to prevent the submission of the photographs. Williams argues that this error violated his Sixth Amendment right to be informed of the nature of the charges against which he must defend. See, e.g., In re Ruffalo, 390 U.S. 544 (1968); Cole v. Arkansas, 333 U.S. 196 (1948); Rosen v. United States, 161 U.S. 29 (1896).

On direct appeal, the Virginia Supreme Court rejected this due process claim:

> In our opinion, due process does not require that the Commonwealth limit itself to a pre-trial construction of the character of Williams's conduct. Furthermore, Williams has no constitutional right to a bill of particulars if the indictments are sufficient to give him notice of the nature and character of the offenses charged, which these indictments do, so that he can make his defense. *Strickler v. Commonwealth*, 241 Va. 482, 490-91, 404 S.E.2d 227, 233, *cert. denied*, 502 U.S. 944 (1991); *Spencer v. Commonwealth*, 238, [sic] Va. at 303-304, 384 S.E.2d at 791.

Williams, 248 Va. at 538. Respondent argues that this Court must defer to the Virginia Supreme Court's reasonable rejection of Williams' claim and that to grant federal collateral relief would

violate the "new rule" doctrine.

Pursuant to a recent U.S. Supreme Court decision, Gray v. Netherland, 116 S. Ct. 2074 (1996), the Court finds that Respondent is correct. In Gray, the U.S. Supreme Court held that granting relief on a petitioner's claim that he had a due process right to be given adequate notice of the evidence to be used against him during the penalty stage of his capital murder trial would require the adoption of a "new rule." See id. at 2084. Although Williams argues that he was not requesting "penalty-stage discovery," the Court finds otherwise. Because federal habeas relief is not available on a "notice-of-evidence" claim, the Court must dismiss this claim.

4. Prosecutorial Misconduct

Claim IV(A)(1)

Williams alleges that the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose to the defense that Cruse did in fact have an agreement with the Commonwealth for a life sentence in exchange for his testimony against Williams. Respondent points out, however, that both the Commonwealth's Attorney and Cruse's attorney have confirmed under oath that Cruse had no formal plea agreement with the Commonwealth at the time of Williams' trial. See Resp't State

Ex. C, D (affidavits).

It is undisputed that prior to trial, the Commonwealth informed defense counsel that a plea agreement had previously been reached with Cruse, that the agreement had been breached by Cruse, and that the Commonwealth had revoked the agreement. However, the Commonwealth never produced a copy of the revoked written plea agreement to defense counsel. In fact, until the agreement was introduced by the Commonwealth at trial, defense counsel had thought that the agreement had been oral. See Aff. of R. Donald Ford, Jr. ¶ 8.

In any event, Williams contends that Cruse and the Commonwealth did have an understanding that Cruse would not receive the death penalty in return for his cooperation and testimony against Williams. In support of this allegation, Williams proffers the following:

(1) statements made by Cruse and the prosecutor during Cruse's direct and redirect examination which indicated that a plea agreement was expected as a result of Cruse's testimony against Williams;

> Q: You've indicated to the jury you're charged with capital murder right now; is that correct?
> A: Correct.
> Q: Is it your understanding that the Judge is going to decide whether you live or die?
> A: Correct.
>
> Tr. 1-4-94 at 212 (emphasis added).

(2) statements made by the prosecutor during closing arguments which raised a clear inference that there was a direct relationship between the content of Cruse's testimony and his sentence on charges of capital murder;

> [Cruse] sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. And like he told you right now his back is against the wall; if he lies, he dies, and that is his situation.
>
> Tr. 1-6-94 at 52 (emphasis added).

(3) Cruse's plea of guilty to the capital murder of Mrs. Keller two months after Williams' conviction;

(4) the reduction of the charge of first degree murder of Mr. Keller to participation as a principal in the second degree;

(5) the fact that Cruse pled guilty before a trial date was ever set in his case; and

(6) the Commonwealth's sentencing recommendation that Cruse's life be spared.

Williams argues that when viewed together, this sequence of events strongly suggests that some sort of understanding or informal agreement existed between Cruse and the Commonwealth at the time of Williams' trial.

In dismissing this claim, the Virginia Supreme Court provided no insight as to the manner or reason by which it made its factual or legal determinations. The deferential standard mandated by 28 U.S.C. § 2254(d) therefore has less meaning in

this situation. See Cardwell v. Netherland, 971 F. Supp. 997 (E.D. Va. 1997). The Court is mindful, however, that its review is restricted to those facts as presented in state court proceedings.

Pursuant to Brady, the Commonwealth is required to disclose evidence that is favorable to the defendant and "material either to guilt or punishment." Brady, 373 U.S. at 87. This includes impeachment evidence because "such evidence is 'evidence favorable to an accused,' [] so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." United States v. Bagley, 473 U.S. 667, 676 (1985) (internal citation omitted). Disclosure of such evidence is especially important where, as here, "the reliability of a given witness may well be determinative of guilt or innocence[.]" Id. at 677.

In the instant case, Cruse played a critical role in the Commonwealth's case against Williams. It is undisputed that the physical evidence could not conclusively establish who fired the fatal shots. Not only could it not be determined in what sequence the shots were fired, but the bullet fragments from Mr. Keller's wounds could not be identified. Given that both Cruse and Williams offered drastically different versions of the

shootings,[11] Williams' conviction clearly hinged on the credibility of each defendant. As evidenced by the jury's verdict, the jury chose to believe Cruse over Williams. Had the jury known that Cruse had some sort of agreement, understanding, or expectation with the Commonwealth regarding his sentence for the Keller murders, there is little doubt that their assessment of Cruse's credibility would have been affected. As the U.S. Supreme Court has stated, "[t]he fact that the stake [in the petitioner's conviction] was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction." Bagley, 473 U.S. at 683.

Accordingly, Williams was entitled to know whether any informal understanding had been reached between Cruse and the Commonwealth prior to or at the time of Cruse's testimony at trial. There being no evidence that defense counsel had any knowledge of or access to such information other than the revoked

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[11] Cruse testified that he fired only once--at Mrs. Keller--and that Williams fired all other shots. Williams, however, testified that he fired only once--the non-fatal wound to Mr. Keller's head--and that Cruse fired all other shots, including the three shots to Mrs. Keller's head.

written plea agreement,[19] the Court will grant Williams an evidentiary hearing on this claim. The motion to dismiss will be denied.

5. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the U.S. Supreme Court set forth the standard for determining whether a criminal defense lawyer has acted so egregiously as to deprive the defendant of his Sixth Amendment right to counsel. Petitioner must establish two elements: first, that counsel's performance was deficient; and second, that the deficient performance prejudiced the defendant. See id. at 687. This is an exacting standard: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relief on as having produced a just result." Id. at 686.

Under the first prong, the petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. In order to avoid the

[19] Hoke v. Netherland, 92 F.3d 1350, 1355 (4th Cir.), cert. denied, 117 S. Ct. 630 (1996); United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990).

distorting effects of hindsight, however, the Court must evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The Court "must [also] appreciate the practical limitations and tactical decisions that trial counsel faced." Bunch v. Thompson, 949 F.2d 1354, 1363 (4th Cir. 1991), cert. denied, 505 U.S. 1230 (1992). Rather than second-guessing decisions which are the result of trial tactics or strategy, the reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; see also Williams v. Dixon, 961 F.2d 448, 451 (4th Cir.), cert. denied, 506 U.S. 991 (1992); McDougall v. Dixon, 921 F.2d 518, 539 (4th Cir. 1990), cert. denied, 501 U.S. 1223 (1991).

The second prong of the Strickland test, the "prejudice" inquiry, requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." 466 U.S. at 687. Accordingly, the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a "probability sufficient to undermine confidence

in the outcome." Id. Counsel's errors, even if unreasonable, must be shown to have "actually had an adverse effect on the defense." Id. at 693.

When analyzing ineffective assistance of counsel claims involving appellate counsel, the Fourth Circuit has held that appellate counsel are "entitled to a presumption that [they] decided which issues were most likely to afford relief on appeal." Evans v. Thompson, 881 F.2d 117, 125 (4th Cir. 1989), cert. denied, 497 U.S. 1010 (1990). Furthermore, counsel are not obligated to assert all non-frivolous issues. Rather, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from incompetence, is the hallmark of effective appellate advocacy." Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir. 1989), cert. denied, 493 U.S. 946 (1990) (quotations and citations omitted).

The Virginia Supreme Court has considered and rejected the ineffective assistance of counsel claims discussed below. Under the new standard set forth in § 2254(d), this Court's review is limited to a determination of whether or not the Virginia Supreme Court's resolution of these claims was a reasonable interpretation of the Strickland standard and other relevant U.S. Supreme Court precedent. However, this Court notes that the

Virginia Supreme Court issued a one page summary order in Williams' state habeas petition.[20] Where the Virginia Supreme Court provides no insight as to the manner or reason by which it applied federal law to the facts of the case, a federal court must necessarily perform its own review of the record. The deferential standard mandated by § 2254(d)(1) has less meaning in this situation. See Cardwell v. Netherland, 971 F. Supp. 997 (E.D. Va. 1997).

Claim V(A)(1)

In his federal habeas petition, Williams argues that defense counsel's performance was constitutionally deficient because (1) counsel failed to object to the trial court's erroneous charge on the triggerman rule and the degrees of murder, and (2) counsel failed to preserve the claims regarding the trial court's refusal to give Williams' proposed Instructions #19 and #20.

On direct appeal, the Virginia Supreme Court, citing Strickler v. Commonwealth, 241 Va. 482, cert. denied, 502 U.S. 944 (1991), ruled that the trial court's Instruction #18

[20] Specifically, the Virginia Supreme Court held that it found "no merit in petitioner's remaining allegations" and ordered that Williams' state habeas petition be dismissed. Order Upon a Petition for a Writ of Habeas Corpus, issued by the Virginia Supreme Court, March 18, 1996.

correctly stated the triggerman rule. See Williams, 248 Va. at 545. Under Virginia law, only the immediate perpetrator of a murder may be convicted of capital murder. See Va. Code § 18.2-18; Johnson v. Commonwealth, 220 Va. 146, 150 (1979), cert. denied, 454 U.S. 920 (1981). "[W]here two or more persons take a direct part in inflicting fatal injuries, [however,] each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes." Strickler, 241 Va. at 495. Although there is conflicting evidence as to which shot actually killed the Kellers, Cruse's testimony and Williams' own testimony convincingly demonstrate that Williams played a "direct part in inflicting fatal injuries" and thus, is liable as an "immediate perpetrator" of the Kellers' murders. See id. That being the case, the Court finds that the trial court did not give an erroneous charge and that defense counsel did not perform ineffectively by failing to object.

As for defense counsel's failure to preserve the claims regarding the trial court's rejection of Williams' proposed instructions, the Virginia Supreme Court ruled that pursuant to Jenkins v. Commonwealth, 244 Va. 445, 460-61 (1992), cert. denied, 507 U.S. 1036 (1993), Williams had waived those claims because counsel merely "incorporate[d] by reference" the argument

made in the trial court for consideration on appeal. See Williams, 248 Va. at 545. Assuming arguendo that counsel's performance was deficient in this regard, Williams must still demonstrate prejudice. He fails to do so in this case. The proposed instructions were not only a misstatement of Virginia law, but they directly contradicted the charge which was ultimately given to the jury--a charge which the Virginia Supreme Court found to be a correct statement of Virginia law. Accordingly, the Court finds that Williams has failed to satisfy either prong of the Strickland test.

Claim V(A)(2)

Williams essentially argues that defense counsel failed to effectively impeach Cruse's testimony. Specifically, Williams takes issue with the following acts or omissions of defense counsel: (1) failure to object to leading questions; (2) failure to cross-examine Cruse on the rape of Mrs. Keller, his alleged breach of the plea agreement, his motives for testifying, his failure to take a polygraph examination as required by the plea agreement, the written plea agreement, his consumption of alcohol on the night of the murders, and his ability to recall the details of that night; (3) failure to interview Cruse or his lawyers regarding the nature, extent, or existence of a plea

agreement; and (4) failure to interview law enforcement officers regarding the nature, extent, or details of any statements made by Cruse to law enforcement officers.

To refut Williams' allegations, Respondent has submitted the unrebutted affidavit of Williams' defense counsel which was filed in the state habeas proceedings. Among other things, the affidavit details defense counsel's investigation into and preparation for Cruse's testimony. Specifically, defense counsel reviewed the Commonwealth's investigative file, Cruse's criminal record, Cruse's statements to the police, and Cruse's testimony at the preliminary hearings; interviewed the primary State Police investigator and the attorneys who represented Cruse at the preliminary hearings; and created a strategy to paint Cruse as "a person who repeatedly had lied to the police, and who, although he said he no longer had a plea agreement, was testifying the way he thought the prosecution wanted him to testify about Williams' role in the offenses in order to save his own life." Resp't Federal Ex. D at 3. In light of defense counsel's representations, it appears that Williams' complaints amount to little more than second-guessing a trial strategy that did not work. Accordingly, the Court finds that Williams has failed to bear his burden of proving deficient performance and prejudice

under Strickland.

Claim V(A)(3)

Williams claims that defense counsel were ineffective because they failed to investigate, develop, and present evidence of voluntary intoxication as a defense and to impeach his co-defendant, Cruse, with evidence of his intoxication. Although Respondent addresses Williams' claim regarding intoxication as a defense, he argues that the claim regarding counsel's failure to impeach Cruse is defaulted because it was never raised in state court. The Court will address each contention in turn.

a. Intoxication as a Defense

The affidavit submitted by Williams' defense counsel belies his claim that they were ineffective in failing to mount a voluntary intoxication defense. In fact, the affidavit demonstrates that after a reasonable investigation, counsel determined that voluntary intoxication would not be a viable defense in Williams' case. Counsel based this conclusion on their multiple interviews with Williams in which he repeatedly gave "a consistent, coherent account" of the Kellers murders and Prince Edward County homicides; thorough research of Virginia law on the issue of voluntary intoxication as a defense to premeditated murder; and Williams' own testimony at the guilt

stage of trial. In counsel's opinion, Williams had the capacity for premeditation and the ability to act upon his plans, irrespective of the amount of alcohol or types of drugs he had consumed. Under Strickland, counsel's strategic decision to forego a voluntary intoxication defense after a reasonable investigation of that defense cannot be said to be so outside "the wide range of reasonable professional assistance[]" so as to constitute ineffective assistance of counsel. Strickland, 466 U.S. at 689.

b. Intoxication to Impeach Cruse

In his state habeas petition, Williams claimed ineffective assistance of counsel with respect to defense counsel's failure to argue intoxication to the jury as a basis for impeaching Cruse's testimony. In his federal habeas petition, Williams' claim is that defense counsel failed to cross-examine Cruse on the issue of intoxication. Respondent contends that the claims are distinct and having failed to present the latter in state court, Williams is barred from raising it on federal habeas review. The Court agrees.

Claim V(A)(4)

Williams premises this ineffective assistance of counsel claim on defense counsel's failure to object when the trial court

allegedly omitted a jury charge on the Commonwealth's burden of proving beyond a reasonable doubt that Williams committed the crimes. Respondent contends that the record clearly refutes this claim.

During both the jury selection process and at the guilt stage, the trial court repeatedly informed the jurors that Williams was presumed innocent "and not guilty unless and until the Commonwealth proves each and every element beyond a reasonable doubt." See, e.g., Tr. 1-3-94 at 20-21, 119-120, 155-156, 210-211, 264-265; 1-6-94 at 9. Furthermore, in the instructions listing the elements of each charged offense, the trial court stated that "the Commonwealth must prove beyond a reasonable doubt each of the following elements." Tr. 1-6-94 at 11-22. The trial court also instructed the jury that "[t]here is no burden on the defendant to produce any evidence." See, e.g., Tr. 1-6-94 at 10.

Based on the foregoing, the Court is hard-pressed to find how defense counsel's performance could be deficient in this case when the record clearly shows that the trial court did instruct the jury on the burden of proof. Accordingly, the Court finds that Williams has failed to satisfy the Strickland test.

Claim V(A)(5)

Williams claims that defense counsel were ineffective on voir dire. Specifically, Williams argues that defense counsel failed to object to the trial court's alleged errors on voir dire, failed to rehabilitate three specific jurors, failed to object to confusing and misleading prosecutorial questions, failed to preserve the issue for appellate review, and failed to conduct extensive voir dire on the issue of pretrial publicity

a. Failure to Protect Right-to-Life Qualification Questions

1. & 2. Jurors Trent and Holman

The transcript of the jury selection proceedings reveals that Jurors Trent and Holman initially indicated that they could fairly consider giving the death penalty. Upon further questioning, however, Jurors Trent and Holman expressed serious reservations about imposing a death sentence regardless of the evidence presented and the instructions given by the court. Although the paper record is somewhat confusing as to the equivocal answers given by Jurors Trent and Holman, this Court is required to give deference to the state trial judge's findings of fact. See § 2254(e)(1). This Court must also refrain from second-guessing defense counsel's tactical decisions to not

object to the prosecutor's questions, attempt further rehabilitation, or object to the exclusion for cause of Jurors Trent and Holman. Even assuming arguendo that defense counsel were deficient, Williams has failed to come forth with clear and convincing evidence to rebut the trial court's finding that Jurors Trent and Holman could not impartially consider imposing a death sentence. Accordingly, the Court finds that Williams has failed to satisfy the Strickland test.

3. Juror Bernard

Both the prosecution and the defense agreed to strike Juror Bernard for cause. Defense counsel's affidavit clearly demonstrates that counsel made a strategic decision to not object to the prosecutor's challenge for cause because "we were of the opinion that, on balance, the juror's answers indicated she would be a pro-prosecution juror." Resp't Federal Ex. D at 2. Absent evidence to the contrary, the Court will not second-guess defense counsel's tactical decision. Furthermore, Williams has failed to demonstrate that except for counsel's failure to object to the removal of Juror Bernard for cause, there is a reasonable probability that the outcome of the proceeding would have been different.

b. Failure to Challenge Prospective Juror Stinnett for Cause

Respondent contends that this claim is barred from federal habeas review because it was never raised in state court. Williams argues, however, that this is Williams' first opportunity to present this claim because both the Commonwealth and Juror Stinnett withheld vital information on voir dire. Specifically, Juror Stinnett failed to reveal her former marriage to a prosecution witness, Deputy Sheriff Claude B. Meinhard who investigated the Keller murders; and the prosecutor failed to disclose that he had represented Deputy Sheriff Meinhard during his divorce proceedings.

Although the Court is troubled by these allegations, Williams has failed to demonstrate how defense counsel was deficient in failing to challenge Juror Stinnett for cause. Williams himself states that "[if counsel were aware to [sic] Stinnett's relationship to trial witness Meinhard, failed to reveal the relationship to Williams or to the court, and failed to move to strike Stinnett for cause, then counsel were ineffective under Strickland and Williams was prejudiced." Pet'r Opp'n at 52 (emphasis added). Williams, however, has presented no evidence to establish that defense counsel actually knew of

Juror Stinnett's former marriage to Deputy Sheriff Meinhard. Accordingly, the Court finds no basis for holding that defense counsel were ineffective in not questioning Juror Stinnettt about matters of which counsel were completely unaware.

c. Failure to Conduct Extensive Voir Dire on the Issue of Pretrial Publicity

The Constitution guarantees criminal defendants a jury consisting of "impartial, indifferent" persons. Murphy v. Florida, 421 U.S. 794, 799 (1975) (citation omitted). In this case, several local newspaper stories were published about Williams and his involvement in the Keller murders as well as the Prince Edward County murders in the months leading up to his trial. In light of this, Williams argues that defense counsel were constitutionally ineffective at voir dire by failing to determine whether individual jurors had been influenced by pretrial publicity to Williams' prejudice.

As a preliminary matter, the Court notes that defense counsel did move for a change of venue which the trial court denied. As to the voir dire process, the trial transcript reflects that the trial judge questioned all the prospective jurors as to their exposure to pretrial publicity. See, e.g., Tr. 1-3-94 at 56-57, 75-76. In those instances where a

prospective juror had been exposed to pretrial publicity, the trial judge pursued the issue of prejudice.

> Has any of you formed any opinion as to the guilt or innocence by virtue of what you have heard or read?
> . . . .
> Considering what you have read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before you reach any fixed opinion or conclusion concerning the guilt or innocence of the accused?

Tr. 1-3-94 at 57. The trial judge then followed up his questions concerning exposure to pretrial publicity with questions concerning preconceptions about Williams' guilt. The judge also inquired about prejudice against both Williams and the Commonwealth. Finally, the judge gave defense counsel an opportunity to examine the prospective jurors. Contrary to Williams' assertion, defense counsel did pursue those prospective jurors who had admitted to being exposed to pretrial publicity. See, e.g., Tr. 1-3-94 at 67-68, 85-86.

Given that the trial court had already reached "the heart of the issue with respect to pre-trial exposure to publicity--that is, whether the [prospective jurors] had developed a fixed pre-

conception,"[21] the Court finds that defense counsel's tactical decision to not conduct a more detailed voir dire did not prejudice Williams' rights in this regard. Accordingly, Williams has failed to satisfy both prongs of the Strickland test.

Claim V(A)(6)

Prior to trial, Williams moved for the appointment of a private investigator to assist in investigating issues of mitigation evidence and a possible change of venue; the trial court denied the motion. On appeal, Williams argued that investigative assistance was required to investigate (1) Cruse's credibility and (2) the evidence of the Prince Edward County murders. Because these arguments were not presented to the trial court, the Virginia Supreme Court refused to consider the claim. See Williams, 248 Va. at 539. Williams now claims ineffective assistance of counsel on those grounds.

The Virginia Supreme Court has repeatedly held that an indigent capital defendant is not constitutionally entitled to the appointment of a private investigator. See, e.g., Gray v. Commonwealth, 233 Va. 313, 330 (1987); Watkins v. Commonwealth, 229 Va. 469, 478 (1985), cert. denied, 475 U.S. 1099 (1986). An

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[21] Clanton v. Blair, 619 F. Supp. 1491, 1501 (E.D. Va. 1985) (Merhige, J.).

indigent capital defendant is, however, entitled to be provided with "the basic tools of an adequate defense." Ake v. Oklahoma, 470 U.S. 68, 77 (1985). This could include non-psychiatric experts if the defendant is able to make "a particularized showing of need for the assistance of such experts." Husske v. Commonwealth, 252 Va. 203, 211 (1996), cert. denied, 117 S. Ct. 1092 (1997).

In the instant case, Williams asserts that the discovery of a September 1993 psychological report on Cruse[22] is a prime example of information that would have been beneficial to Williams' defense, but that could not be discovered without an investigator. In the report, the consulting psychiatrist notes that Cruse has "little recollection of the event, other than vague memories[]"--information which would have been beneficial in challenging Cruse's trial testimony. Pet'r Ex. D. Respondent argues, however, that Williams is precluded by 28 U.S.C. § 2254(e)(2) from introducing this report in support of his federal habeas petition because it was never presented to the state

[22] Williams claims that the Commonwealth failed to disclose this report, which contained valuable Brady information, to defense counsel. See infra Claim IV(A)(2).

courts in support of his state habeas petition.[23]

Although section 2254(e)(2) does not apply when a petitioner is denied the opportunity to develop a record in the state proceeding, Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded the same type of assistance at both state and federal habeas--namely, court-appointed attorneys. The Court can therefore discern no reason and has been offered no explanation why state habeas counsel failed to discover the report and present it in state habeas proceedings. In light of this, Williams has failed to bear his burden of demonstrating that defense counsel were ineffective in failing to secure the appointment of an investigator, much less that there is a

[23] The applicable section of the statute provides that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows" and then provides limited exceptions. 28 U.S.C. § 2254(e)(2). Williams argues, however, that he did not "fail" to develop a factual basis in state proceedings; he was denied the tools necessary to do so by the Virginia Supreme Court. Section 2254(e)(2) does not apply when a petitioner attempts to develop a record in the state proceeding, but is denied that opportunity by the state court. See Cardwell v. Netherland, 971 F. Supp. 997 (E.D. Va. 1997).

reasonable probability that the outcome of his trial would have been different.

Claim V(A)(7)

During the guilt phase, the Commonwealth presented the testimony of Mrs. Keller's mother and Mr. Keller's brother as a means of identifying the personal property taken from the Kellers' home. Prior to their testimony, defense counsel were apparently prepared to stipulate to the evidence. Williams argues that by failing to promptly do so, defense counsel allowed "unnecessarily emotional and inflammatory testimony" to be presented to the jury, thereby prejudicing his case. The Court finds, however, that Williams has failed to show that the stipulation, if accepted, would probably have changed the outcome of the trial. Accordingly, pursuant to Strickland, this claim must be dismissed.

Claims V(A)(8) & V(A)(9)

During the prosecution's arguments, defense counsel did not offer a single objection despite numerous instances in which the prosecutor allegedly misstated the evidence, interjected opinion, mischaracterized testimony, argued facts not in evidence, and made other improper arguments. Williams claims that he was, in effect, without counsel during opening and closing arguments;

thus, so he contends, defense counsel's performance was unconstitutionally deficient and he was prejudiced as a result.

Defense counsel state in their affidavit, however, that

> [a]s a matter of general strategy, we believe it is better not to object to a prosecutor's remarks or arguments to the jury unless absolutely necessary. Such objections run the risk of emphasizing adverse matters before the jury or giving the jury the impression the defense is trying to cover something up. In Michael Williams' case, we refrained from making such objections because, in our opinion, any such objections would have been overruled by the trial judge and the objections could have adversely affected our client in the jury's eyes.

Resp't Federal Ex. D at 4. Such a strategy appears reasonable and accordingly, did not render Williams' defense counsel constitutionally ineffective. Moreover, Williams has failed to show a reasonable probability that the outcome of either phase of the proceedings would have been different if defense counsel had made any or all of Williams' suggested objections.

Claim V(B)(1)

At the outset of the penalty phase, the Commonwealth called the mother of Mrs. Keller as a witness. Williams argues that her appearance was totally irrelevant and indeed, was "designed to elicit the juror's sympathy and arouse their anger against Williams." Pet'r Opp'n at 56. As a consequence, Williams claims

that defense counsel should have objected to her testimony and their failure to do so constitutes ineffective assistance of counsel.

On direct appeal, the Virginia Supreme Court assessed the testimony of Mrs. Keller's mother as follows: "[she] testified only as to her daughter's age and marriage to Mr. Keller and identified a photograph of the Kellers [as they appeared before their deaths]. The record does not disclose that [she] displayed any particular emotion during the short period of her testimony." Williams, 248 Va. at 548. Our review of the record concurs with this assessment.

The Court also agrees, however, with Williams' argument that the prosecutor could have argued the statutory aggravators based on previously admitted crime scene photographs which sufficiently depicted the vileness of the crime. Williams has not proferred any evidence, however, to establish that defense counsel's decision not to object on relevancy grounds was not a tactical decision. Moreover, Williams has failed to suggest any concrete evidence of prejudice as a result of his counsel's alleged deficient conduct. Accordingly, this claim must be dismissed.

Claim V(B)(2)

Williams argues that his defense counsel were ineffective in

failing to timely object to photographs of the Prince Edward County victims and to properly argue the objection. The issue of the photographs arose during the Commonwealth's examination of the medical examiner, Dr. William Massello. Dr. Massello had been called to identify the four victims of the Prince Edward County shootings and to establish their cause of death. In addition to the autopsy reports, the Commonwealth sought to introduce photographs of each victim's head[24] in order to establish "vileness." Defense counsel immediately objected and engaged in heated argument in the presence of the jury. The trial court finally admitted the photographs, but only after the Commonwealth changed the grounds for which they were offered --to establish "future dangerousness" and to corroborate the testimony of Williams' brother about the shootings. On direct appeal, the Virginia Supreme Court ruled that the photographs were properly admitted and rejected Williams' argument that the photographs need not be admitted because the same facts were contained in the autopsy reports.

Williams now argues that defense counsel were ineffective in

[24] The photographs graphically demonstrated that each victim had been shot in the head and that parts of each head had been subsequently burned. Williams, 248 Va. at 547.

failing to "foresee the inflammatory and prejudicial effect the Prince Edward photographs would have on the jurors and fail[ing] to object to their admission in advance of the medical examiner's testimony." Pet'r Opp'n at 57. The unrebutted affidavit submitted by defense counsel refuts this contention. See Resp't Federal Ex. D at 6. Moreover, as Respondent correctly notes, defense counsel did raise their objection to the photographs in a manner that was timely and specific enough to have the issue decided on appeal.

Even assuming that defense counsel's performance was deficient in failing to preempt the issue before it reached the jury, Williams has not shown that there is a reasonable probability that the outcome of the penalty phase would have been different if counsel had succeeded in keeping the photographs out--the autopsy reports which explicitly described the wounds of the Prince Edward County victims were already before the jury. Nor has Williams demonstrated that raising the objection outside the presence of the jury would probably have changed the ultimate sentence. For these reasons, this claim must be dismissed under Strickland.

Claim V(B)(3)

In addition to failing to prevent the admission of the

Prince Edward County photographs, Williams claims his defense counsel were ineffective on the grounds that they did not attempt to develop defense evidence and mitigating information through the medical examiner's testimony. Williams' brother, John, had testified that he, Williams, and the Prince Edward County victims had been drinking heavily on the night of the shootings. Williams now argues that defense counsel should have attempted to posit an explanation for the shootings by cross-examining Dr. Massello--specifically, that a drunken Williams had acted out of provocation or self-defense when threatened by an equally intoxicated man with a gun. Respondent argues, however, that defense counsel made "a deliberate, tactical decision not to cross-examine Dr. Massello" which should not be second-guessed on habeas review. Resp't Mot. to Dismiss at 50-51.

The affidavit submitted by defense counsel in the state habeas proceeding confirms Respondent's contention:

> We were thoroughly prepared for Dr. Massello's testimony at the penalty stage regarding the autopsies of the four Prince Edward County victims. We had reviewed all of the autopsy reports and Dr. Massello's testimony was consistent with those reports. We decided, as a matter of trial strategy, not to cross-examine Dr. Massello. Our strategy was to get Dr. Massello off the witness stand as quickly as possible. We did not want to ask him any questions which might

> result either in his using the photographs of the victims to illustrate his response or in the prosecution's using the photographs again on redirect. The photographs were very damaging to the defense and we simply did not want to run the risk of making a bad situation worse.

Resp't Federal Ex. D at 5-6.

Furthermore, there is no evidence that Williams was prejudiced by defense counsel's failure to cross-examine Dr. Massello and elicit information on levels of intoxication and time of death. In fact, a review of the trial transcript shows that Williams' proposed justification for shooting the Prince Edward County victims would not have been borne out by the evidence. Dr. Massello testified that Villalobos, the victim who allegedly provoked Williams, was shot "to the back of the right side of the head. . . . And as opposed to being a round hole, that you would expect a bullet to make, this is a very ragged, sort of star-shaped appearing wound, and this is from the effects of the muzzle of the gun being held in contact with the head at the time of discharge . . . ." Tr. 1-6-94 at 109, 112-13 (emphasis added). The other victims were also shot at fairly close range. See, e.g., Tr. 1-6-94 at 128. In the face of evidence which clearly contradicts Williams' self-defense argument, the Court finds that Williams was not prejudiced by

defense counsel's decision to not call further attention to Dr. Massello's damaging testimony.

Claim V(B)(4)

Williams also claims ineffective assistance of counsel with respect to defense counsel's failure to cross-examine his brother, John. Although John testified that he had passed out prior to the shootings and thus did not know anything about the shootings other than what his brother had confessed to him, Williams argues that defense counsel could have elicited favorable evidence relating to the issue of self-defense. Furthermore, Williams claims that defense counsel could and should have humanized him by questioning John as to Williams' concern for John on the night of the shooting, Williams' remorse over the shooting of one of the victims, and John's own willingness to help his brother.

Again, the affidavit demonstrates that defense counsel made a deliberate, tactical decision not to cross-examine John.

> [H]is testimony regarding what the defendant had told him about the Prince Edward homicides was a more favorable version of the event than what the defendant had told us. Johnny was a reluctant prosecution witness and it was our impression that the prosecution had not succeeded on direct examination in eliciting from him all the information it had hoped to elicit. . . .

> (W)e did not want to risk inadvertently eliciting such adverse information on cross-examination or giving the prosecution another chance to do so on redirect.

Resp't Federal Ex. D at 6. Absent evidence to the contrary, the Court does not find that defense counsel acted unreasonably. Under Strickland, this claim must be dismissed.

Claim V(B)(5)

Williams claims that defense counsel were ineffective for failing to object when the prosecutor cross-examined Williams' mother and maternal grandfather about the events leading to Williams' arrest. On direct examination, defense counsel had questioned Williams' mother about family history and Williams' learning disabilities, drug abuse, and other problems; Williams' grandfather was called to testify about Williams' strong work ethic and positive relationships with family members. On cross-examination, however, the prosecutor focused exclusively on Williams' arrest and the role of Williams' mother in persuading her son to surrender--topics clearly beyond the scope of direct examination. Defense counsel then failed to conduct any redirect examination to rehabilitate these mitigation witnesses.

In their affidavit, defense counsel state that it would have been futile to object: "such an objection certainly would have

been overruled on the grounds that the Commonwealth was entitled to cross-examine the witnesses on the issue of bias." Resp't Federal Ex. D at 6. The Court agrees with Williams, however, that "effective representation requires that counsel make appropriate objections to limit harmful evidence at trial and to preserve that issue for further appellate review." Pet'r Opp'n at 60. Counsel's prediction that their objection might be overruled by the trial court does not excuse their failure to object to obviously improper cross-examination.

As arguably deficient as defense counsel's performance may have been in this regard, however, Williams has not alluded to any prejudice whatever arising from defense counsel's omission. There is no evidence that the outcome of the penalty phase would probably have been different had defense counsel objected. Williams has thus failed to meet the "prejudice" prong of the Strickland test, and the instant claim must be dismissed.

Claim V(B)(6)

Williams argues that defense counsel were ineffective in failing to present evidence of his drug and alcohol abuse as a mitigating factor during the sentencing phase. Evidence at the guilt phase established that Williams had been drinking heavily on the night of the Keller murders and the Prince Edward County

shootings. Evidence at the penalty phase further established that Williams had an extensive history of drug and alcohol abuse. Defense counsel did not, however, argue Williams' state of mind, the effect of Williams' drug and alcohol intoxication at the time of both the Keller and Prince Edward County murders, or the effect of drug and alcohol use on Williams who suffers from Attention Deficit and Hyperactivity Disorder ("ADHD"). Once again, defense counsel's affidavit provides an explanation for this alleged deficiency.

Defense counsel assert that "[i]t was our strategy not to assert [Williams'] intoxication at the time of the crimes as an excuse for his actions, but rather as part of a continuing symptom of his overall disorder." Resp't Federal Ex. D at 5. A review of the record confirms that defense counsel pursued this strategy throughout the penalty phase. Through the testimony of Dr. Dewey Cornell, the clinical psychologist appointed to assist the defense, defense counsel established that Williams suffered from ADHD and elicited information on the negative effects that drug and alcohol abuse have on a person with ADHD. Defense counsel also called members of Williams' family to testify about Williams' learning disabilities and continuing drug addiction. And contrary to Williams' assertion, defense counsel did argue

Williams' intoxication at the time of the Keller and Prince Edward County murders on summation, albeit not in as much detail as Williams would have liked. Given the fact that it is "common knowledge that many find it difficult to view the illegal use of narcotics under any circumstances as a mitigating factor,"[25] the Court cannot say that counsel's performance was unreasonable.

Although it is tempting to opine in hindsight what defense counsel could and should have done at the sentencing phase, that is not the province of this Court. It is Williams' burden to demonstrate both deficient performance and prejudice from defense counsel's alleged mishandling of the issue of his drug and alcohol intoxication. Williams has not done so and thus, the claim must be dismissed.

Claim V(B)(7)

Williams next argues that defense counsel failed to protect the testimony of his mitigation expert, Dr. Cornell, from numerous objections and interruptions by both the prosecutor and the trial court. Other than the conclusory allegation that "[c]ounsel was wholly ineffective in addressing these issues," however, Williams has not provided any concrete evidence of

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[25] Woomer v. Aiken, 856 F.2d 677, 684 (4th Cir. 1988), cert. denied, 489 U.S. 1091 (1989).

deficient performance. On the contrary, the trial transcript clearly shows that defense counsel did respond, often times vigorously, to the prosecutor's attempts to limit Dr. Cornell's testimony. Defense counsel also challenged the trial court when it sought to advance the mitigation presentation. In light of this, the Court finds that Williams has failed to overcome the strong presumption that defense counsel's performance in presenting Dr. Cornell's testimony fell within the wide range of professionally competent performance. Moreover, Williams offers nothing more than mere speculation as to the prejudicial effect of defense counsel's conduct on his case. Under Strickland, more is required; this claim therefore fails.

Claim V(B)(8)

Williams claims ineffective assistance of counsel based on defense counsel's failure to request an evaluation of Williams by a neuropsychologist to determine whether he suffered from brain dysfunction. In the state habeas proceeding, Williams submitted the affidavit of a neuropsychologist, Dr. Robert Hart, who, after reviewing the testimony and evidence presented at trial, concluded that there was an indication of possible brain dysfunction which clearly required a thorough neuropsychological examination. Williams now contends that defense counsel's

failure to pursue such an examination constitutes deficient performance and prejudiced his case.

Defense counsel responds, however, that they thoroughly consulted with Dr. Cornell, their mitigation expert who was familiar with the field of neuropsychology, and specifically discussed the possibility of organic brain dysfunction. Specifically, defense counsel state in their affidavit that:

> Dr. Cornell never indicated to us that further testing or evaluation was necessary or advisable. We specifically discussed with Dr. Cornell whether Michael Williams had organic brain damage because we were aware, and Dr. Cornell was aware, that at the time of Michael's birth there had been complications which reportedly had resulted in Michael not breathing for a period of time. Dr. Cornell, however, informed us that he had performed his own tests, including several standard neuropsychological tests, and satisfied himself that no further testing was indicated.
>
> . . . If Dr. Cornell had informed us that further evaluation was necessary or advisable, we would have requested the trial judge to authorize such an evaluation.

Resp't Federal Ex. D at 7-8.

Regardless of whether Williams believes that Dr. Cornell's neuropsychological assessment was inadequate, Williams has failed to prove that defense counsel's conduct was so objectively unreasonable as to constitute deficient performance. See, e.g.,

Pruett v. Thompson, 996 F.2d 1560, 1573-74 (4th Cir.), cert. denied, 510 U.S. 984 (1993). Defense counsel asked other members of the criminal defense bar to recommend a mitigation expert who would begin an evaluation on Williams' side; provided Dr. Cornell with all of the relevant information concerning the crimes and Williams' life history; and consulted with Dr. Cornell on numerous occasions prior to trial. Based on the foregoing, the Court finds that Williams received effective assistance of counsel within the meaning of Strickland.

Claim V(B)(9)

During the penalty phase, defense counsel elected not to put Williams on the stand. Williams now claims that had he testified, defense counsel could have elicited beneficial mitigation and rebuttal evidence which would have provided the jury with a reason for imposing a life sentence. Williams asserts that this failure to present his testimony demonstrates the absence of any defense strategy because "there was simply no advantage to a decision to withhold his testimony at the sentencing phase given the magnitude of the crimes involved." Pet'r Opp'n at 65.

Defense counsel's affidavit belies this contention. The record reveals that defense counsel discussed the issue of

testifying with Williams several times before trial, mid-trial, and the night before he testified at the guilt stage. Counsel repeatedly advised Williams of all the benefits and risks involved in testifying, and informed Williams that the ultimate decision was his to make. Only after viewing Williams' performance on the witness stand at the guilt stage--in particular, his "very cold" demeanor--did defense counsel decide not to call him during the penalty phase and risk subjecting him to damaging cross-examination about the Prince Edward County shootings. See Resp't Federal Ex. D at 9. Under these circumstances, the Court is hard-pressed to find how defense counsel's performance could be deemed ineffective.

Claim V(B)(10)

At the conclusion of the penalty phase, the trial court failed to instruct the jury as to the nature and use of the mitigation evidence presented by Williams. Williams now claims that defense counsel's failure to object to the allegedly deficient jury instructions and to request a corrective mitigation instruction deprived him of effective assistance of counsel. As discussed previously with respect to Claim VII(A), however, the Fourth Circuit has routinely held that penalty stage instructions beyond the standard Virginia sentencing instruction

are not constitutionally required, particularly on the issue of mitigation. See, e.g., Buchanan v. Angelone, 103 F.3d 344, 347-48 (4th Cir. 1996) (holding that "Virginia's death penalty scheme survives constitutional scrutiny, despite its 'failure to instruct the jury on statutory mitigating factors'") (citation omitted); Jones v. Murray, 947 F.2d 1106, 1119-20 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992); Clozza v. Murray, 913 F.2d 1092, 1005 (4th Cir. 1990), cert. denied, 499 U.S. 913 (1991). Thus, defense counsel's conduct cannot be said to be deficient in this regard.

Claim V(B)(11)

For the reasons stated above with respect to Claims V(A)(8) and V(A)(9), this claim is likewise dismissed under Strickland.

Claim V(B)(12)

Williams claims that defense counsel presented ineffective argument at the penalty phase and failed to provide the jury with persuasive reasons to impose a sentence of life rather than death. Contrary to Respondent's assertion, Williams does specify those mitigating factors that defense counsel did not argue or argued ineffectively as well as those arguments that harmed Williams' case. See Pet. at 145-46. After reviewing the trial transcript, however, the Court does not find that defense

counsel's argument was so lacking as to fall below the wide range of professionally competent performance.

In closing argument, counsel did discuss Williams' history of drug and alcohol abuse; traumatic events in his life, including sexual abuse and an unstable home; ADHD and its effect on Williams; his loving and close relationship with his family; and his intoxication on the night of the Keller murders and Prince Edward County shootings. Counsel also stressed that the jury had the option of imposing a life sentence regardless if they found either of the statutory aggravating factors and that there was enough hope for Williams that the jury should impose a life sentence. See Tr. 1-7-94 at 208-212, 215-24. Absent post hoc rationalization, the Court cannot say that defense counsel's conduct was objectively unreasonable under Strickland.

Claim V(B)(13)

As a final matter, Williams claims that defense counsel's errors at the sentencing phase individually and collectively prejudiced his case. Aggregating alleged errors that themselves do not constitute ineffective assistance is not sufficient to meet the stringent standard under Strickland. See Thomas-Bey v. Smith, 869 F. Supp. 1214, 1230-31 (1994), aff'd, 67 F.3d 296 (4th Cir. 1995). Accordingly, this claim must be dismissed.

Claim V(C)(1)[26]

Williams claims that defense counsel, who were also appellate counsel, rendered ineffective assistance by failing to properly appeal the denial of proposed Instructions #19 and #20 to the Virginia Supreme Court. See infra Claim V(A)(1). Specifically, because appellate counsel merely "'incorporate[d] by reference' the argument he made in the trial court," the Virginia Supreme Court refused to consider the claim on appeal. Williams, 248 Va. at 545. Williams argues that this omission of "an obviously winning issue" constitutes ineffective assistance of counsel on appeal. Pet. at 148.

As discussed previously with respect to Claim V(A)(1), however, assuming arguendo that counsel's performance was deficient in this regard, Williams must still demonstrate prejudice. Although the Court agrees that Williams is not required to demonstrate that the omitted claim would have resulted in a reversal on appeal, Williams must demonstrate that there is a reasonable probability that the outcome of the appeal would have been different. Given the Virginia Supreme Court's

[26] Respondent concedes that Claim V(C)(1) was raised in Williams' state habeas petition and dismissed by the Virginia Supreme Court on the grounds that it was without merit. See Resp't Reply at 26.

determination that the trial court's Instruction #18 was a correct statement of Virginia law, counsel's failure to properly appeal the issue would not have changed the outcome. Thus, the Court finds that Williams was not denied effective assistance of appellate counsel.

Claim V(C)(2)[27]

Williams next argues that counsel failed to properly preserve objections or properly frame its appeal of the trial court's erroneous restrictions of voir dire. Rather than specifically appeal the trial court's restrictions on questions concerning juror attitudes about the death penalty, counsel appealed the trial court's general denial of expanded voir dire. Williams argues that the failure to properly frame the issue under applicable U.S. Supreme Court precedent constituted ineffective assistance of counsel. Assuming arguendo that counsel was deficient in this regard, Williams has not demonstrated that there is a reasonable probability that the direct appeal decision would have come out any differently had counsel appealed the issue with more specificity. Accordingly,

[27] Respondent concedes that Claim V(C)(2) was raised in Williams' state habeas petition and dismissed by the Virginia Supreme Court on the grounds that it was without merit. See Resp't Reply at 26.

this claim must be dismissed.

Claim V(C)(3)

Williams' final claim is that appellate counsel failed to properly appeal the trial court's refusal to strike Juror Davis. At trial, defense counsel objected to Juror Davis on the ground that he strongly favored the death penalty. On direct appeal, however, appellate counsel proposed a different argument--namely, that the trial court applied the wrong disqualification standards. Noting that the latter objection was not made in the trial court, the Virginia Supreme Court dismissed the claim pursuant to its Rule 5:25. See Williams, 248 Va. at 540.

Whether appellate counsel should have narrowly tailored the appeal regarding juror exclusion to the treatment of each individual juror, the Court is not persuaded that counsel's failure to do so does falls outside the wide range of objectively reasonable performance. Given that Williams has alleged that the trial court treated Jurors Trent, Holman, Bernard, and Davis differently, it is not unreasonable for appellate counsel to have framed the appeal in such terms as would encompass the trial court's allegedly erroneous treatment of all these jurors.

The Court also notes that the state trial judge found Juror Davis to be impartial; this Court is required to give deference

to that finding of fact. See § 2254(e)(1). In the absence of clear and convincing evidence to rebut the trial court's finding that Juror Davis could impartially consider imposing a life or death sentence, the Court finds that Williams has failed to establish prejudice resulting from appellate counsel's failure to litigate this specific claim on appeal. Under Strickland, this claim must be dismissed.

VII. CONCLUSION

Respondent's Motion to Dismiss the petition will be GRANTED IN PART AND DENIED IN PART. An Evidentiary Hearing will be GRANTED with respect to Claims I(A), IV(A)(1), and IV(A)(5).

/s/
UNITED STATES DISTRICT JUDGE

DATE: April 13, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
OCT 31 1996
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

MICHAEL WAYNE WILLIAMS,
Petitioner,

v.

J. D. NETHERLAND, Warden,
Mecklenburg Correctional Center,
Respondent.

Civil Action No.
3:96CV529

ORDER

Petitioner, through counsel, appeared before the Court after notice to the Respondent for purposes of demonstrating a need for confidentiality by reason of having requested services pursuant to 21 U.S.C. § 848(q)(9), and the Court directed an adversarial hearing wherein the Court expressed the view that it would be necessary for Petitioner to list his alleged claims to the end that the Court be advised by Respondent of any which allegedly have been defaulted to which action Petitioner objected, but did, however, at the Court's request, file a list of his intended claims, which the Court has refrained from looking at and sealed until such time as the United States Court of Appeals for the Fourth Circuit renders a decision as to whether said listed claims may be shown to Respondent as this Court deems necessary.

Let the Clerk send copies of this Order to all counsel of record.

UNITED STATES DISTRICT JUDGE

Date OCT 31 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
OCT - 7 1996
CLERK, U.S. DISTRICT COURT

MICHAEL WAYNE WILLIAMS,
Petitioner,

v.

J.D. NETHERLAND, Warden,
Respondent.

Civil Action
No. 3:96cv529

ORDER

The Court is in receipt of the respondent's motion opposing petitioner's request to proceed ex parte under 21 U.S.C. § 848(q)(9). Deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED, that the Court grants respondent's motion for an adversarial hearing for the limited purpose of assessing petitioner's need for confidentiality.

Petitioner's counsel is requested to arrange a conference call with respondent's counsel so that an appropriate hearing date may be set.

Let the Clerk send copies of this Order to counsel of record.

UNITED STATES DISTRICT JUDGE

October 7, 1996
DATE

24

FILED
SEP 18 1996
CLERK, U.S. DISTRICT COURT
RICHMOND VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

J.D. NETHERLAND, Warden,

Respondent.

Civil Action
No. 3:96cv529

ORDER

The Court is in receipt of the respondent's letter requesting an adversarial hearing on petitioner's ex parte requests under 21 U.S.C. § 848(q)(9). Deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED, that the Court's earlier Orders granting petitioner permission to proceed ex parte and under seal are hereby STAYED until the further Order of this Court.

Let the Clerk send copies of this Order to counsel of record.

UNITED STATES DISTRICT JUDGE

Sept. 18, 1996
DATE

21

FILED
SEP - 5 1996
CLERK, U.S. DISTRICT COURT
RICHMOND VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

J. D. NETHERLAND, WARDEN
MECKLENBURG CORRECTION CENTER,

Respondent.

Civil Action No. 3:96CV529

UNDER SEAL

ORDER

This matter is before the Court on Petitioner's Motion for Leave to Proceed Ex Parte and Under Seal. Good cause and the need for confidentiality having been shown, it is hereby

ORDERED that Petitioner may proceed ex parte for purposes of requesting the assistance of experts under 21 U.S.C. §§ 848(q)(9); and it is further

ORDERED that all motions, supporting memoranda, and court orders relating to Petitioner's request for the assistance of experts shall be placed under seal.

It is so ORDERED.

UNITED STATES DISTRICT JUDGE

September 2, 1996

18

FILED
SEP - 3 1996
CLERK, U.S. DISTRICT COURT
RICHMOND VA

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 18th day of March, 1996.

Michael Wayne Williams, Petitioner,

against Record No. 951589

Warden of the Mecklenburg Correctional Center, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Applying the rule in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations I(A), I(B), I(C), I(D), I(E), I(F), I(G), I(H), I(J), I(K), III(C), III(H)(2), III(J), III(L), III(M) and III(U); the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations I(H) (to the extent petitioner relies on the prosecutor's closing arguments), I(I), I(J) (to the extent petitioner relies on gender and economic status), I(K) (to the extent petitioner relies on the length of time he will spend on death row), III(A)(1), III(A)(2), III(B), III(E), III(F), III(G), III(H)(1), III(I), III(K), III(N), III(O), III(P), III(Q), III(R), III(S), III(T), IV(A), IV(B), IV(D), IV(E), V(A); and finding no merit in petitioner's remaining allegations, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. On further consideration whereof, petitioner's motion for expert services, motion for production of Jeffrey Allen Cruse and discovery relating to Jeffrey Allen Cruse are denied. It

is therefore ordered that the said petition be dismissed and the rule be discharged. Chief Justice Carrico took no part in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By: Patricia A. Kenegar
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 13th *day of* January, 1995.

Michael Wayne Williams, Appellant,

against Record No. 940445
Circuit Court No. F-143

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 4th day of November, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

Chief Justice Carrico took no part in the consideration or decision in this case.

A Copy,

Teste:

Clerk

nsel's continuing objection, de- tems stolen as two 13–inch color ts "with just normal tuners, all that were "a year, two years in "good working order." Nei- that he had not purchased the company but that he had "used as "familiar" with them. When e prosecutor, "All right, sir, in , had you wanted to sell those ts for their fair market value on y were stolen, what would be—," nsel interrupted and objected. n was overruled, and the prose- ed with, "What would you have ose television sets, each, on the eft?" The witness answered, "I hundred and fifty dollars."

tated that he had never sold a t nor had he "looked at the clas- or the sale of televisions." He it he did not "personally" buy ment" for the company but that rders for equipment and was fa- equipment value "to a degree" amination of catalogs.

rther stated that in his "normal a citizen," he had purchased tele- nd that he owned a set that was a 13–inch model. The witness at when he "was looking to buy a t," he "priced" them and that he perience as a manager for the nd his "personal experience" into n when relating the stolen items' ally, when Neiman was asked if y about value "was a guess," he 'That's the value I would place on

rney General argues that the peals correctly ruled there was idence to support the jury's find- stolen property had a value of more. We disagree.

enerally, the opinion testimony of f personal property is competent ble on the question of the value of rty, regardless of the owner's of property values. *Haynes* v. Va. 746, 750, 91 S.E.2d 433, 436

1956). But Neiman was not the owner of the televisions, only an employee of the corporation that owned them. Ownership of property by a corporation does not automatically qualify a company employee to testify about the value of company property. *Jones v. State*, 408 So.2d 690, 691 (Fla.Dist.Ct.App. 1982) (employee of hotel who was night clerk on duty when television set stolen lacked requisite knowledge regarding the property and its value).

[4] However, the general rule is that opinion testimony of a nonexpert, who is not the owner of the personal property in question, is admissible upon the subject of property value, provided the witness possesses sufficient knowledge of the value of the property or has had ample opportunity for forming a correct opinion as to value. *Haynes*, 197 Va. at 750, 91 S.E.2d at 436; *Kerr v. Clinchfield Coal Corp.*, 169 Va. 149, 155–56, 192 S.E. 741, 743 (1937). *See Veney v. Commonwealth*, 212 Va. 805, 806–07, 188 S.E.2d 80, 81–82 (1972); *Hicks v. Commonwealth*, 157 Va. 939, 944, 161 S.E. 919, 920–21 (1932); *Wadley v. Commonwealth*, 98 Va. 803, 806–08, 35 S.E. 452, 453–54 (1900); *Norfolk & Western Ry. Co. v. Reeves*, 97 Va. 284, 288–90, 33 S.E. 606, 607 (1899). *See generally* 3 *Wigmore on Evidence* § 716(2) (Chadbourn Rev. 1970).

[5] Applying the general rule, we hold the evidence of value presented in this case was inadequate as a matter of law to establish that element of the crime beyond a reasonable doubt. Neiman demonstrated insufficient knowledge of the value of the stolen items. Moreover, he lacked ample opportunity for forming an accurate opinion on value. In sum, his testimony upon fair market value of the television sets was wholly without foundation, thus resulting in a failure of the Commonwealth's proof.

Employed by the cable television company as production manager for "just over a month," Neiman described the items, stated their age, and said they were in "good working order." But he did not testify about the original cost or "the effect of age and wear and tear" on the value of the stolen equipment. *Dunn v. Commonwealth*, 222 Va. 704, 705, 284 S.E.2d 792, 792 (1981) (original pur- ce of stolen item admissible in grand larceny prosecution, but due allowance for elements of depreciation necessary to establish current value). Neiman, who did not personally buy equipment for his employer, merely based his estimate of fair market value on "personal experience" as a consumer and "experience as a manager for the company," neither of which afforded him a basis for giving a competent opinion of value.

Accordingly, the order of the Court of Appeals will be reversed and the judgment of conviction will be vacated. The case will be remanded to the Court of Appeals with direction that it be remanded to the circuit court for a new trial upon a charge of petit larceny.

Reversed and remanded.

Michael Wayne WILLIAMS

v.

COMMONWEALTH of Virginia.

Record No. 940445.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant was convicted by the Circuit Court of Cumberland County, John R. Snoddy, Jr., J., of two capital murders, rape, burglary, and arson, and he appealed his capital murder convictions. The Supreme Court, Whiting, J., held that: (1) defendant had no constitutional right to bill of particulars on vileness predicate for death penalty based on indictments that were sufficient to give him notice of nature and character of offenses charged; (2) trial court did not abuse its discretion in denying defendant's motion for change of venue; (3) trial court did not commit manifest error in excusing prospective juror who testified that she

would automatically refuse to impose death penalty because of her religious beliefs; (4) trial court did not abuse its discretion in refusing to declare mistrial after prosecution witness made reference to defendant's involvement in four other uncharged murders; (5) trial court did not abuse its discretion in admitting six photographs of victims' bodies at scene of their murders; (6) trial court did not abuse its discretion by allowing accomplice to testify on direct examination that he had no plea agreement with Commonwealth in exchange for his testimony implicating defendant; (7) trial court properly refused to permit evidence that accomplice testifying for prosecution had been convicted of assault and battery as impermissible attack upon his credibility; (8) evidence was sufficient to support defendant's convictions for capital murder; (9) defendant was not put in double jeopardy by his convictions on five charges of capital murder when only two people had been killed, since only one death sentence was imposed for each victim; (10) review of sentencing hearing did not indicate that jury, in opposing death sentence, was influenced by passion, prejudice, or any other arbitrary factor; and (11) defendant's death sentences were not excessive or disproportionate to penalties imposed by other sentencing bodies in Commonwealth for similar conduct, considering both crimes and defendant.

Affirmed.

1. **Criminal Law** ⇐1035(5)

Defendant's objections to exclusion of prospective jurors would not be considered on appeal, where defendant did not object to their exclusion at trial.

2. **Criminal Law** ⇐1038.1(1), 1038.2

Defendant's objection to trial court's grant and refusal of certain penalty phase jury instructions would not be reviewed on appeal, where defendant did not object to these actions at trial.

3. **Indictment and Information** ⇐121.2(5)

Defendant had no right to bill of particulars requiring Commonwealth to identify every narrowing construction of vileness factor in death penalty statute on which it intended to offer evidence. Were indictments were sufficient to give him notice of nature and character of offenses charged. Code 1950, § 19.2-264.4, subd. C.

4. **Constitutional Law** ⇐268(2.1)

Due process does not require Commonwealth to limit itself to pretrial construction of character of defendant's conduct. U.S.C.A. Const.Amend. 5.

5. **Criminal Law** ⇐126(2)

Trial court did not abuse its discretion in denying defendant's motion for change of venue based on pretrial publicity, where there was no evidence that pretrial publicity was inaccurate or that it was difficult to empanel jury.

6. **Criminal Law** ⇐134(1)

Defendant seeking change of venue has burden of showing that there was widespread prejudice against him in county which would be reasonably certain to prevent fair trial. U.S.C.A. Const.Amend. 6.

7. **Criminal Law** ⇐121, 1150

Decision whether to grant change of venue is within sound discretion of trial court, and will not be disturbed on appeal absent abuse of discretion.

8. **Criminal Law** ⇐1031(1)

Defendant's motion for assistance of private investigator to investigate credibility of accomplice testimony and evidence of other crimes which would be considered in penalty phase on issue of defendant's future dangerousness, which was not raised at trial, would not be considered on appeal.

9. **Jury** ⇐131(8)

Defendant was not allowed to inject issues of parole in his voir dire examination, where he was not ineligible for parole when capital case was tried.

10. **Criminal Law** ⇐1035(5)

Defendant could not raise on appeal his claim that trial court applied wrong standard in refusing to disqualify prospective juror, where he failed to raise claim at trial.

iminal Law ⇐1035(5)

Trial court did not commit manifest error in excluding prospective juror who testified that she would automatically refuse to impose death penalty because of her religious beliefs and that she would not consider court's directions to consider death sentence as well as sentence of life imprisonment.

12. **Criminal Law** ⇐1166.17

Supreme Court will not reverse ruling on exclusion of prospective juror based on juror's views that would prevent or substantially impair performance of his or her duties as juror in accordance with trial judge's instructions and oath in absence of showing of manifest error.

13. **Criminal Law** ⇐867

Trial court did not abuse its discretion in refusing to declare mistrial based on witness' apparent reference to unadjudicated acts of murder and arson allegedly involving defendant, where defendant declined trial court's offer to instruct jury to disregard that testimony.

14. **Criminal Law** ⇐438(5.1)

Trial court did not abuse its discretion in admitting six photographs of victims' bodies at scene of their murders.

15. **Witnesses** ⇐318

Trial court did not abuse its discretion in allowing accomplice to testify on direct examination that he had no plea agreement with Commonwealth in exchange for his testimony, though accomplice's credibility had not been attacked, where defendant advised court that he planned to attack accomplice's credibility.

16. **Witnesses** ⇐318

Ordinarily, evidence of witness' credibility is not admissible until witness' credibility is attacked.

17. **Criminal Law** ⇐680(1), 1153(1)

Order of proof in trial is matter committed to sound discretion of trial court, and reviewing court will not reverse ruling varying order of proof in absence of abuse of discretion.

18. **W** **s** ⇐414(1)

Evidence that accomplice testifying against defendant was upset by pictures of murder scene was appropriate corroboration of his testimony that he wanted to get testimony off his chest, properly rebutting suggestion that he was testifying to get death penalty off his back.

19. **Witnesses** ⇐345(2)

Trial court properly refused to permit defendant to show that accomplice testifying against him had conviction for assault and battery, where accomplice admitted firing first shot at one of victims, eliminating any doubt of his proclivity for assaultive behavior for evidence to be admissible for purpose other than attacking accomplice's credibility.

20. **Criminal Law** ⇐339.7(1), 339.9(3)

Prosecution witness' identification of defendant as one of two men from whom she bought some of victims' property on day after they were murdered was admissible, though she could not initially identify defendant in courtroom, where she identified a photograph of him that had been shown to her shortly after she had bought some of the stolen property, and then later volunteered that she saw him in courtroom.

21. **Criminal Law** ⇐706(4)

Commonwealth did not engage in improper cross-examination of defendant by asking him whether he was only witness who had been present in courtroom and heard testimony of witnesses who had already testified, thereby allegedly impermissibly burdening his constitutional rights, where question merely reflected what jury already knew.

22. **Criminal Law** ⇐406(5)

Defendant's out-of-court statement to police officer transporting him from different state that he could prove that accomplice had gun was admissible under party admission exception to hearsay rule.

23. **Homicide** ⇐305

Trial court properly instructed jury that defendant could be convicted of capital murder if evidence establishes that defendant jointly participated in fatal shooting, though deaths were caused by firearm, where ac-

complice testified that both he and defendant shot one of victims, and medical examiner testified that victim's death was caused by three gunshot wounds.

24. Criminal Law ⇐1130(3)

Supreme Court would not consider arguments presented in trial court that were simply incorporated by reference in defendant's appellate brief.

25. Homicide ⇐234(5)

Evidence was sufficient to support defendant's convictions for capital murder, though there was evidence that accomplice fired first shot, where defendant fired remaining shots into victim's body, medical examiner testified that one of victims was killed by combination of three shots, and evidence amply supported factual finding that defendant killed both victims as part of same acts or transactions of robbing them and raping one of them.

26. Homicide ⇐235

Evidence that defendant went to victims' house intending to rob them and, while committing robbery, he and accomplice raped one of victims, and that they killed victims because defendant did not want to leave witnesses amply supported conclusion that robberies, rape, and subsequent murders were so closely related in time, place and causal connection as to make killings, as matter of law, part of same criminal enterprise. Code 1950, § 18.2-31, subd. 5.

27. Double Jeopardy ⇐150(1)

Defendant was not put in double jeopardy by his conviction of five charges of capital murder when only two people were killed, where jury fixed only one death sentence for each victim. U.S.C.A. Const.Amend. 5.

28. Criminal Law ⇐438(6, 7)

Trial court did not abuse its discretion in admitting photographs of four victims in unadjudicated crime to establish defendant's future dangerousness and to corroborate testimony of defendant's brother on defendant's confession that he shot and killed the four men; fact that autopsy reports reflected same facts as photographs did not make photographs inadmissible.

29. Criminal Law ⇐438(1), 675

Decision whether to admit photographic evidence of crime establishing same facts as another exhibit is within sound discretion of trial court.

30. Criminal Law ⇐438(7)

Introduction of pictures of charred bodies of victims in another crime did not inflame jury, compelling them to impose death penalty, where there was no evidence in record to indicate that jury disregarded trial court's instruction to consider photographs only for purposes of showing defendant's future dangerousness.

31. Criminal Law ⇐986.6(3)

Testimony of victim's mother during sentencing hearing as to her daughter's age and marriage to second victim and her identification of photograph of victims was not inadmissible victim impact evidence; record did not disclose that victim's mother displayed any particular emotion during short period of her testimony.

32. Criminal Law ⇐1208.1(5)

Defendant's mitigating evidence at death sentencing hearing that defendant suffered from childhood mental disorder known as attention deficit hyperactivity disorder, that his mother had several unpleasant relationships with men, and that his family members indicated that he was caring, loving, generous, and dependable person did not compel jury to impose life sentences rather than capital punishment. Code 1950, § 17-110.1.

33. Homicide ⇐357(6, 11)

Defendant's death sentences, based on findings of future dangerousness and vileness, were not excessive or disproportionate to penalties imposed by other sentencing bodies in Commonwealth for similar conduct, where defendant was sole participant in another case involving multiple murders and arson, and defendant suggested committing robberies, rape and execution-type killings of victims and arson of their house in case for which he was being sentenced. Code 1950, § 17-110.1, subd. C, par. 2.

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R. [illegible]d Ford, Jr. (Lucretia A. Carrico, Hayes & Carrico, on brief), for appellant.

Donald R. Curry, Sr. Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: COMPTON, STEPHENSON, WHITING, LACY, HASSELL and KEENAN, JJ., and HARRISON, Retired Justice.

WHITING, Justice.

Michael Wayne Williams was tried upon indictments charging him with 12 felonies arising out of the February 27, 1993, murders of Morris C. Keller, Jr., and his wife, Mary Elizabeth Keller, in Cumberland County. Five indictments charged Williams with the capital murders of Mr. and Mrs. Keller, two of which charged their murders in the course of a robbery while armed with a deadly weapon, Code § 18.2-31(4), two of which charged the Kellers' murders subsequent to the rape of Mrs. Keller, Code § 18.2-31(5), and the fifth indictment charged the killing of the Kellers as a part of the same act or transaction, Code § 18.2-31(7). The seven remaining indictments charged Williams with Mrs. Keller's rape, the burglary and arson of Mr. Keller's house, and the robberies and abductions of the Kellers.

In the first stage of a bifurcated trial conducted pursuant to Code §§ 19.2-264.3 and -264.4, a jury convicted Williams of all 12 charges and fixed his punishments on the non-capital convictions. In the second stage of the trial of the capital murder charges, the jury fixed Williams's punishments for the capital murder of Mrs. Keller at death and for the capital murder of Mr. Keller at death, based on its findings of "future dangerousness" and "vileness." The court then referred the matter to the probation officer for an investigation and report pursuant to the provisions of Code § 19.2-264.5. After considering the probation officer's report, the court imposed the jury sentences.

Williams appeals only his capital murder convictions. We have consolidated his appeal with our automatic review of his death sentence under Code § 17-110.1(A).

EVIDENCE

A substantial part of the Commonwealth's evidence comes from the testimony of Jeffrey Alan Cruse, Williams's confederate in these crimes. Pursuant to established principles of appellate review, we will view the evidence and all reasonable inferences arising therefrom in the light most favorable to the Commonwealth, the prevailing party at trial.

Between 9:30 and 10:30 p.m., on Saturday, February 27, 1993, Verena Lozano James drove Williams and Cruse to a rural area in Cumberland County and left them approximately one-half mile from Bear Creek Market. Williams and Cruse planned to rob persons in the market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.

The two men walked to the store, but found it closed. Williams suggested that "he knew a house where we can go; they'd have a couple thousand dollars." Cruse agreed, and they walked some distance to the Kellers' house. Upon arrival at the Kellers' house, Cruse returned the Black Hawk revolver to Williams and Cruse knocked on the door. When Mr. Keller opened the door, Williams pointed the gun at him and both men entered the house.

Williams ordered the Kellers to remove all their clothes, and he remained in the kitchen with them while Cruse began searching the house for money and other valuables. After Cruse found a fully loaded .38 caliber handgun, Williams decided "to tie [the Kellers] up," and Cruse did so. The Kellers were then placed, first in one closet and later in separate closets, and both men resumed their search.

After the two men had assembled some of the Kellers' property in the living room, at Williams's suggestion, first Williams, then Cruse, raped Mrs. Keller. Afterward, Williams ordered both Kellers to take showers and put on clean clothes, which they did. Williams then directed the Kellers to "take a walk" with them. Upon hearing that the two men planned to burn the house, Mrs. Keller took the Kellers' marriage certificate with her. As the Kellers, Williams, and Cruse left

. house and walked "[d]own on a dirt road and into a thicket," Williams was carrying the .38 caliber handgun and Cruse was carrying the Black Hawk revolver.

When they were in the thicket with Williams standing behind Mr. Keller and Cruse standing behind Mrs. Keller, Williams said, "We'll shoot at the count of three." Upon Williams's count of three, he shot Mr. Keller with the .38 caliber handgun and Mr. Keller fell to the ground. However, Cruse did not shoot Mrs. Keller. Williams told Cruse to shoot Mrs. Keller because "he didn't want to leave no witnesses." Cruse then shot Mrs. Keller once with the Black Hawk revolver. After Mrs. Keller fell, Mr. Keller stood up and Williams shot him again with the .38 caliber handgun. As Cruse started to walk away, Williams said, "Wait ... [w]hat if they ain't dead?", and he shot each of the Kellers "a couple more times apiece" with the .38 caliber handgun.

The two men returned to the house, where they loaded a television set, microwave oven, shotgun, stereo set, and speakers into Mr. Keller's jeep, and, at Williams's suggestion, set fire to the house. Williams and Cruse then took the jeep to Fredericksburg, where they sold some of the stolen property the next day. They then threw the remaining stolen property and the Black Hawk revolver into the Rappahannock River and set fire to the jeep.

Upon hearing of the Keller fire on Monday morning, Verena James advised the police that she had taken Williams and Cruse to an area not far from the Keller house on the night of the fire. Consequently, the police sought to question the two men regarding the fire. Williams and Cruse had returned to Cumberland County the Monday following the murders and the police were able to question Cruse. Williams, however, fled to Florida.

At first, Cruse furnished no information of value to the police. However, after the police discovered the bodies of the Kellers on Tuesday, Cruse consulted counsel. His counsel obtained a conditional agreement from the Commonwealth that it would not seek the death penalty provided Cruse gave a truthful statement of his knowledge of the cri Cruse then furnished information that implicated both men in all of the crimes charged, except for Cruse's role in Mrs. Keller's rape. Because Cruse breached his agreement in failing to tell the police that he had raped Mrs. Keller, the Commonwealth also indicted him for the Kellers' capital murders.

Testifying in his own defense, Williams agreed with Cruse: (1) that Williams was the one who suggested robbing persons at the store; (2) that Williams was the first one to shoot Mr. Keller and that Cruse was the first one to shoot Mrs. Keller; and (3) that it was Williams's idea to burn the Keller house. However, Williams (1) denied that he raped Mrs. Keller, (2) claimed that Cruse fired all the subsequent shots into the Kellers' bodies, and (3) contradicted other details of Cruse's testimony about who had suggested some of their activities during and after the murders.

Lisa C. Schiermeier, a serologist, tested the seminal fluid recovered from Mrs. Keller's vagina as a part of the Physical Evidence Recovery Kit prepared by Dr. Deborah Kay, an assistant chief medical examiner who performed the autopsy on Mrs. Keller. Schiermeier compared that sample with the blood types of Cruse, Williams, and Mr. Keller. Schiermeier testified that her comparison indicated only Williams could have contributed a certain type of seminal fluid found in the sample. Dr. George C. Li, a DNA expert who performed a DNA test on the spermatozoa from the sample, testified that his test results were consistent with a conclusion that Cruse and Williams jointly contributed the seminal fluid.

II. ISSUES PREVIOUSLY DECIDED

Williams raises a number of issues that we have previously decided adversely to his contentions. Williams offers no persuasive reasons to modify our previous conclusions, and we perceive none. Hence, we will adhere to our previous rejections of those contentions and will not discuss them beyond citing representative cases expressly rejecting these contentions. The first group of contentions involves Williams's claims of the unconstitu-

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ity of the capital murder and death penalty statutes for the following reasons:

A. The statutes do not give meaningful guidance to a jury because they do not require the jury to find that aggravating circumstances outweigh mitigating ones before fixing the death penalty. Rejected in *Breard v. Commonwealth*, 248 Va. 68, 74, 445 S.E.2d 670, 674–75 (1994), and *Mickens v. Commonwealth*, 247 Va. 395, 403, 442 S.E.2d 678, 684 (1994).

B. As written and administered, the statutes fail to adequately inform the jury that a death sentence may be imposed only upon a finding beyond a reasonable doubt that aggravating circumstances outweigh mitigating ones. Rejected in *Watkins v. Commonwealth*, 229 Va. 469, 490–91, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986).

C. The statutes fail to provide the sentencer with sufficient guidance as to aggravating factors to assure that the death penalty is not imposed in an arbitrary and capricious manner. Rejected in *Mickens*, 247 Va. at 402–403, 442 S.E.2d at 683–84.

D. The "future dangerousness" aggravating factor in the statutes is inherently misleading since it asks jurors to find a probability beyond a reasonable doubt. Rejected in *Mickens*, 247 Va. at 402–403, 442 S.E.2d at 684; *M. Smith v. Commonwealth*, 219 Va. 455, 477–78, 248 S.E.2d 135, 148–49 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

E. That part of the statute, Code § 19.2-264.4(C), which allows the sentencer to find the "future dangerousness" predicate based on unadjudicated criminal conduct, violates the Eighth and Fourteenth Amendments. Additionally, if evidence of such conduct is admissible, the jury should have been instructed that it could only be considered if established beyond a reasonable doubt. Both contentions are rejected in *Breard*, 248 Va. at 74–75, 445 S.E.2d at 675, and in *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, — U.S. —, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993).

F. The "future dangerousness" aggravating factor in the statutes is inherently unreliable insufficient to guide jury discretion. ...jected in *Satcher*, 244 Va. at 227, 421 S.E.2d at 826, and *M. Smith*, 219 Va. at 477–78, 248 S.E.2d at 148–49.

G. The statutes as administered are unconstitutional because the infrequency of the imposition of the death penalty indicates that it is imposed arbitrarily and disproportionately upon black defendants, and the death penalty is repugnant to evolving standards of decency. Rejected in *Satcher*, 244 Va. at 228, 421 S.E.2d at 826.

H. As applied, the statutes are unconstitutional because they deny "meaningful appellate review and there is arbitrary administration of the state created right to proportionality and passion/prejudice review." Rejected in *Mickens*, 247 Va. at 405, 442 S.E.2d at 685.

I. Additionally, Williams argues in conclusional fashion that the statutes violate the Eighth Amendment prohibition against cruel and unusual punishment, the Sixth Amendment right to a fair trial, and the Fourteenth Amendment prohibition against deprivation of a defendant's life without due process. We have rejected each of these claims in the following cases: *Beaver v. Commonwealth*, 232 Va. 521, 527, 352 S.E.2d 342, 345–46, *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987) (claim of cruel and unusual punishment); *Boggs v. Commonwealth*, 229 Va. 501, 514, 331 S.E.2d 407, 417 (1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 347 (1986) (claim of denial of Sixth Amendment right to fair trial); and *Stamper v. Commonwealth*, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980) (claim of lack of due process).

Williams's second group of contentions that have been previously rejected by this Court involves the following:

A. The court erred in denying his motions for individual and sequestered *voir dire* examination of prospective jurors and for additional peremptory juror challenges. Rejected in *Breard*, 248 Va. at 75, 445 S.E.2d at 675, and *Swann v. Commonwealth*, 247 Va. 222, 228, 441 S.E.2d 195, 200 (1994).

...R. The court erred in failing to provide ...ional discovery beyond that required under Rule 3A:11. Rejected in *Spencer v. Commonwealth*, 238 Va. 295, 303–304, 384 S.E.2d 785, 791–92 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990).

III. ISSUES PROCEDURALLY DEFAULTED

[1, 2] We will not consider Williams's present objections to the exclusion of prospective jurors Thomas J. Langhorne, Bobbie Holman, and Mary D. Trent because Williams did not object to their exclusion at trial. Rule 5:25. Nor will we consider Williams's present objections to the court's grant and refusal of certain penalty phase jury instructions because the record does not indicate that Williams objected to these actions by the court. *Id.*

IV. WAIVER OF CERTAIN CONTENTIONS

Williams did not brief, and has therefore waived, assignments of error 10 and 24. Rule 5:27(e).

Also, in his brief, Williams attempts to "incorporate by reference" a number of arguments he made in the trial court for consideration on appeal. We will not consider these arguments since they must be made in the appellate briefs. *See Mickens*, 247 Va. at 401 n. 4, 442 S.E.2d at 683 n. 4, and *Jenkins v. Commonwealth*, 244 Va. 445, 460–61, 423 S.E.2d 360, 370 (1992), *cert. denied*, — U.S. —, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993) (arguments made in trial court cannot be considered on appeal merely by reference thereto in appellate brief).

V. PRETRIAL MOTIONS

Motion for Bill of Particulars

Williams filed a motion for a bill of particulars seeking, among other things, to require the Commonwealth to "identify every narrowing construction of [the "vileness"] factor on which it intends to offer evidence." The death penalty may be imposed if the defendant's "conduct in committing the offense [punishable by death] was outrageously or wan... vile, horrible or inhuman, *in that it* involved ...*rture, depravity of mind or aggravated battery to the victim.*" Code § 19.2-264.4(C) (emphasis added). The necessary narrowing constructions are contained in the emphasized language of Code § 19.2-264.4(C). *See M. Smith*, 219 Va. at 478, 248 S.E.2d at 149 ("depravity of mind" and "aggravated battery" construed).

[3] However, Williams contends that due process requires his pretrial notification of every one of these constructions upon which the Commonwealth will rely at trial. Williams makes this same argument in support of his contention that the "vileness" predicate in the death penalty statutes is unconstitutional.

[4] We find no merit in his arguments. In our opinion, due process does not require that the Commonwealth limit itself to a pretrial construction of the character of Williams's conduct. Furthermore, Williams has no constitutional right to a bill of particulars if the indictments are sufficient to give him notice of the nature and character of the offenses charged, which these indictments do, so that he can make his defense. *Strickler v. Commonwealth*, 241 Va. 482, 490–91, 404 S.E.2d 227, 23..., *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991); *Spencer v. Commonwealth*, 238 Va. at 303–304, 384 S.E.2d at 791.

Motion for Change of Venue

[5] Williams contends that the court should have granted his motion for change of venue because of the prejudicial pretrial publicity of (1) Cruse's account of the Keller murders, and (2) four other recent murders in which Williams was allegedly involved. Those murders had occurred on December 24, 1992, in the nearby town of Rice, which is in Prince Edward County. The bodies of four men were discovered in the ruins of the house where they were shot. The house apparently had been deliberately burned following their murders.

[6, 7] Williams has the burden of showing that there was widespread prejudice against him in Cumberland County which would be

...onably certain to prevent a fair trial." *...ler v. Commonwealth*, 244 Va. 386, 395, 422 S.E.2d 380, 388, *cert. denied*, — U.S. —, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993). The decision whether to grant a change of venue is within the sound discretion of the trial court, and such decision will not be disturbed on appeal absent an abuse of that discretion. *Id.*

Williams does not claim, nor does the record disclose, that the pretrial publicity was inaccurate or that it was difficult to empanel the jury. And of the 37 prospective jurors who were examined, only 4 were required to be excused because they had formed an opinion of Williams's guilt based on the pretrial publicity. Given these circumstances, we find no abuse in the court's discretion in denying Williams's motion for a change of venue.

Motion for Assistance of Private Investigator

[8] Williams, an indigent, contends that the court erred in denying his pretrial motion for the appointment of a private investigator to assist his counsel in his defense. Williams asked the court to delay a ruling on that motion until he was furnished with information that the Commonwealth was to produce in response to his discovery motions. When Williams sought a ruling after completion of discovery, his request was confined to (1) an investigator's assistance in procuring information regarding a change of venue, and (2) mitigation evidence.

However, on appeal, Williams argues that this assistance was required to investigate (1) Cruse's credibility, and (2) the evidence of the Prince Edward County crimes which would be considered in the penalty phase on the issue of Williams's future dangerousness. We will not consider Williams's present arguments because they were not made in the trial court. Rule 5:25.

VI. JURY SELECTION

Limitation of Voir Dire

[9] Williams argues that the court improperly limited his *voir dire* examination by refusing to permit him to ask prospective jurors ...t their "perceptions on parole law." ...ams concedes that he was not ineligible for parole when this case was tried. Accordingly, the trial court ruled correctly that Williams was not allowed to inject issues of parole in his *voir dire* questions. *Ramdass v. Commonwealth*, 248 Va. 515, 520, 450 S.E.2d 360, 361 (this day decided); *Wright v. Commonwealth*, 248 Va. 485, 486, 450 S.E.2d 361, 362 (this day decided).

Retention and Exclusion of Prospective Jurors

Gary Davis

[10] Williams contends that the trial court applied the wrong standard in refusing to disqualify prospective juror Davis. During *voir dire*, Davis said that it would be "tough" to "overlook the death penalty" and impose a life sentence if the Commonwealth proved the aggravating circumstances. According to Williams, the trial court "erroneously applied a standard which would disqualify prospective jurors only if they would *automatically* vote for the death penalty."

However, Williams voiced no such contention in the trial court. Accordingly, we will not consider this contention on appeal. Rule 5:25.

Sharon Barrett Baldwin

[11, 12] Williams complains that the court erroneously excluded prospective juror Baldwin. In deciding whether to exclude a prospective juror, the trial court must determine whether the prospective juror's views "'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Eaton v. Commonwealth*, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)), *cert. denied*, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991). And, in considering this matter on appeal, we defer to the trial court's decision because the trial judge has seen and heard the prospective jurors and is in a better position than we are to rule on these issues. *Breard*, 248 Va. at 77, 445 S.E.2d at 676. Accordingly, we

will not reverse the ruling on appeal in the absence of a showing of "manifest error." *Eaton*, 240 Va. at 246, 397 S.E.2d at 391.

Baldwin testified that she would automatically refuse to impose the death penalty because of her religious beliefs, and that she would not consider the court's directions to consider a death sentence as well as a "life" sentence. Her final answer was that she "would have a very, very hard time [considering the death penalty]." Considering Baldwin's expression of her religious beliefs and her apparent reluctance to consider the court's directions, we find no manifest error in excusing her.

VII. GUILT PHASE

Failure to Grant Mistrial

[13] Verena James testified that she had received a monetary reward for supplying evidence about the Keller fire. She was then asked if she knew of such a reward before she supplied her information to the police. She responded, "No. Through the media I had heard about the Rice fires." This unresponsive answer was an apparent reference to the four recent murders and the arson of the house in Rice.

According to Williams, this information "impermissibly placed before the jurors, at the guilt phase of the trial, the unadjudicated acts of murder." However, there is no contradiction in the record of the trial court's observation that "[n]othing was said about connecting this gentleman with anything about the Rice fires."

Moreover, Williams declined the court's offer to instruct the jury to disregard that testimony. Under these circumstances, we find no abuse of discretion in the court's refusal to declare a mistrial.

Admission of Photographs of Victims and Crime Scene

[14] Williams complains of the allegedly excessive and, therefore, prejudicial number of photographs of the Kellers' bodies at the scene of their murders. Six photographs, some taken from a distance and others taken from a point closer to the bodies, all with different views of the bodies, were introduced in evidence.

The well-established rule is that admission into evidence of "photographs depicting victims and the crime scene is a matter resting within the sound discretion of the trial court." *Breard*, 248 Va. at 82, 445 S.E.2d at 676. We find no abuse of that discretion in the admission of these photographs.

Alleged Errors During Cruse's Testimony

Williams contends that the trial court erred in three rulings during Cruse's testimony. We find no merit in any of these contentions.

[15, 16] First, Williams contends that by allowing Cruse to testify on direct examination that he had no plea agreement with the Commonwealth in exchange for his testimony, the court improperly permitted the Commonwealth "to bolster" Cruse's testimony on direct examination. Williams correctly points out that ordinarily evidence of a witness's credibility is not admissible until the witness's credibility is attacked. *See Jordan v. Taylor*, 209 Va. 43, 48–49, 161 S.E.2d 790, 794 (1968) (improper to elicit testimony from witness tending to bolster that witness's credibility).

[17] However, the order of proof in a trial is a matter committed to the sound discretion of the trial court, and we will not reverse a ruling varying the order of proof in the absence of an abuse of discretion. *Quintana v. Commonwealth*, 224 Va. 127, 142, 295 S.E.2d 643, 650 (1982), *cert. denied*, 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983) (sustaining admission of evidence in rebuttal phase of case more appropriately admissible in case-in-chief); *Hargraves v. Commonwealth*, 219 Va. 604, 608, 248 S.E.2d 814, 817 (1978) (permitting Commonwealth to reopen case after it rested and court heard defendant's motion to strike Commonwealth's evidence). Since Williams advised the court that he planned to attack Cruse's credibility, we find no abuse of that discretion in this case.

[18] Next, Williams argues that the court erred in admitting part of Cruse's testimony. Cruse had testified on direct examination

ne was being prosecuted for capital murder arising from the Keller incidents. On cross-examination, Cruse was asked whether he was testifying "to help [him]self in making [his] case." Cruse responded, "I'm getting it off my chest." Cruse was then asked whether he was "also getting the death penalty off [his] back." Cruse simply responded, "Not really."

Over Williams's objection, Cruse testified on redirect examination that he was unable to look at the pictures of the murder scene because he "lost it." In our opinion, evidence that Cruse was upset by the pictures was appropriate corroboration of his testimony that he wanted to "get it off [his] chest," and, therefore, proper rebuttal to the suggestion that he was "getting the death penalty off [his] back."

[19] Williams's final contention regarding Cruse's testimony is that the court erred in refusing to permit Williams to show Cruse's conviction of an assault and battery. Williams recognizes that because misdemeanor assaults and batteries are not crimes of moral turpitude, evidence of convictions of those crimes is not admissible to attack a witness's credibility. *Clark v. Commonwealth*, 202 Va. 787, 790, 120 S.E.2d 270, 272 (1961). However, because he claims that Cruse's credibility and "proclivity for assaultive behavior was a crucial factor for the jury to decide," Williams contends that this evidence should have been admitted. However, he cites no supporting authority.

Clark states the applicable rule:

> The rule is well settled in Virginia that a witness cannot be asked on cross-examination questions as to collateral independent facts irrelevant to the issue being tried, though bearing on the question of veracity, for the purpose of testing his credibility.

Id. at 789, 120 S.E.2d at 272. We see no reason to create the suggested exception to this rule. Cruse admits he fired the first shot at Mrs. Keller, thereby virtually eliminating any doubt of his "proclivity for assaultive behavior." Accordingly, the trial court correctly excluded this testimony as an inadmissible attack upon Cruse's credibility.

7 my of Tammy Lynn Tolley

[20] Williams maintains that the court erred in the manner in which it permitted Tammy Lynn Tolley to identify him as one of the two men from whom she bought some of the Kellers' property on the day after the Kellers were murdered. When Tolley began testifying, she could not identify Williams by looking at persons in the courtroom. However, over Williams's objection, she identified a photograph of him that had been shown to her shortly after she had bought some of the stolen property.

Later, while responding to a question on another subject, Tolley volunteered, "That's the guy right over there. I didn't see him sitting over there." The Commonwealth's attorney responded, "After looking at him, she identified him," and Tolley said, "I mean, I looked out there. I didn't look up here."

We do not agree with Williams's contention that this was another effort "to rehabilitate" the witness prior to cross-examination. Rather, it was a permissible examination to establish that, on a prior occasion, Tolley had identified Williams as one of the men from whom she bought some of the Kellers' property.

Alleged Improper Cross-Examination of Williams

[21] The witnesses had been excluded from the courtroom when not testifying. Williams contends that the trial court erred in permitting the Commonwealth to ask Williams on cross-examination whether he was the only witness who had been present in the courtroom and heard the testimony of witnesses who had already testified.

According to Williams, this question "impermissibly burdened Williams' [constitutional] right to confront his accusers, to be present at all times during his trial, to present evidence in his favor and to compel process." However, Williams cites no case in which such a question has been held to violate a defendant's constitutional rights, and we find none. We fail to see how those rights are violated by a question that reflected what the jury already knew. Accordingly, we find no merit in this contention.

Admission of Williams's Out-of-Court Statement

[22] Officer John Richard Holt brought Williams back to Cumberland County from Georgia, where Williams was arrested. During the return trip, Holt answered a number of Williams's questions.

Holt testified during the Commonwealth's case-in-chief that in response to Williams's questions, Holt told Williams that the Black Hawk revolver had been recovered from the Rappahannock River. When Williams later asked what Cruse had told the police about the Keller incidents, and Holt said that Cruse had "told us the whole story," Williams responded, "I can prove Jeff had that goddamn Black Hawk."

Willams contends that the court erred in permitting the last out-of-court hearsay statement by Williams. We disagree. Although Williams may have thought that his statement was exculpatory, the statement linked him to the Keller incidents and was thus admissible as a party admission exception to the hearsay rule. *Stewart v. Commonwealth*, 245 Va. 222, 236, 427 S.E.2d 394, 403, *cert. denied*, — U.S. —, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993) (statement to witness prior to defendant's wife's murder that defendant had consulted counsel regarding divorce admissible under party admission exception to hearsay rule).

Instructions

[23] Williams contends that the court erred in granting Instruction 18 which told the jury that:

> You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal shooting, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death.

In *Strickler*, we noted that "where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes." 241 Va. at 495, 404 S.E.2d at 235. However, Williams contends that *Strickler* is distinguishable from this case because in *Strickler* two persons used a heavy rock to kill the victim. Here, Williams notes that "the deaths were caused by a firearm which only requires the action of one person in pulling the trigger."

However, Williams overlooks Cruse's testimony that both he and Williams shot Mrs. Keller in the head, that Cruse used the Black Hawk revolver, and that Williams used the .38 caliber handgun. He also overlooks the testimony of Dr. Kay. Although Dr. Kay testified that any one of Mrs. Keller's three facial wounds "could" have been lethal, she concluded in her autopsy report that Mrs. Keller's death was caused by three "[g]unshot wounds of face."

Accordingly, the jury could have found from the evidence that Williams and Cruse each took a direct part in inflicting Mrs. Keller's fatal injuries. Hence, the instruction was proper for that reason.

[24] Next, in assignment of error 28, Williams contends that the court erred in refusing his tendered Instructions 19 and 20. However, he merely "incorporates by reference" the argument he made in the trial court in support of his present contention. As we have noted earlier, we will not consider arguments presented in the trial court that are simply incorporated by reference in an appellate brief. Accordingly, Williams has waived this contention.

Sufficiency of Evidence

[25] Williams maintains that the evidence is insufficient in several respects to support his convictions for capital murder. First, he claims that Cruse killed Mrs. Keller with the first shot. However, as we have noted earlier, Dr. Kay's testimony was sufficient to indicate that Mrs. Keller was killed by the combination of the three shots to her face.

Next, Williams argues that the evidence is insufficient to show that he killed Mr. Keller since Mr. Keller stood up after Williams shot him. However, even if Williams did not kill Mr. Keller on the first shot, the jury could have found that Williams did so later when, according to Cruse, Williams fired the remaining shots into Mr. Keller's body.

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Thus, in our opinion, there is sufficient evidence to support the jury's finding that Williams had actively participated in the murders of both Mr. and Mrs. Keller. Additionally, the evidence amply supports the factual finding that Williams killed both Kellers as a part of the same acts or transactions of robbing them and raping Mrs. Keller.

[26] As his final argument on the sufficiency of the evidence, Williams contends that the "predicate felonies of rape and robbery were not sufficiently close in time and place to the murders of Mr. and Mrs. Keller to elevate those murders to capital murder." We disagree.

The evidence indicates that Williams and Cruse went to the Kellers' house intending to rob them and, while committing the robbery, they raped Mrs. Keller. The evidence also shows that they killed the Kellers because Williams "didn't want to leave no witnesses." In our opinion, this evidence amply supports the conclusion that the robberies, the rape, and the subsequent murders were "so closely related in time, place, and causal connection as to make the killing[s], as a matter of law, a part of the same criminal enterprise." *Briley v. Commonwealth*, 221 Va. 532, 544, 273 S.E.2d 48, 56 (1980), *cert. denied*, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981).

Additionally, one of the specifically defined acts of capital murder is the "willful, deliberate, and premeditated murder of any person, in the commission of, or subsequent to, rape." Code § 18.2-31(5). There is no doubt that the Kellers were murdered shortly after Mrs. Keller's rape. Accordingly, we conclude that the evidence is sufficient to sustain Williams's capital murder convictions.

Alleged Double Jeopardy Violation

[27] Williams contends that he was put in double jeopardy by his conviction of five charges of capital murder when only two people had been killed, thereby violating the proscriptions against double jeopardy contained in the Fifth Amendment of the Constitution of the United States, Article I, Section 8 of the Virginia Constitution, and Code § 19.2-294. We disagree.

ed not consider whether Williams was charged with multiple offenses arising from the same act or offense since he was prosecuted for those offenses in the same trial. *Blythe v. Commonwealth*, 222 Va. 722, 725, 284 S.E.2d 796, 798 (1981). We are concerned only with his constitutional and statutory rights not to be subjected to multiple punishments for the same act or offense. *Thomas v. Commonwealth*, 244 Va. 1, 9, 419 S.E.2d 606, 610, *cert. denied*, — U.S. —, 113 S.Ct. 421, 121 L.Ed.2d 343 (1992). Here, although Williams was convicted of five charges of capital murder, each based separately upon proof beyond a reasonable doubt, the jury fixed only one death sentence for each victim. Under these circumstances, Williams was not subjected to multiple punishments for what he claims was the same act or offense. *Id.*

VIII. PENALTY PHASE

Admission of Photographs of Other Murders

Williams confessed to John Howard Williams, his brother, that he had shot and killed the four men and set fire to the house in Rice. The court permitted the Commonwealth to introduce photographs of each victim's head showing that each had been shot in the head and that parts of the head were partially burned.

[28] The Commonwealth claimed that the photographs were relevant not only to establish Williams's future dangerousness by indicating the atrociousness of the Prince Edward County murders, but also to corroborate the testimony of John Williams as to Williams's confession to him. The court admitted the photographs over Williams's objection that the four victims' autopsy reports, which were admitted in evidence, showed the same things that the photographs did and that the photographs were inflammatory. The parties make the same arguments on appeal.

[29] The fact that the autopsy reports reflect the same facts as the photographs does not make the photographs inadmissible. *See Spencer*, 238 Va. at 312, 384 S.E.2d at 796 (even though videotape of crime scene

admitted in evidence, still photographs of crime scene also admissible). And the decision whether to admit photographic evidence of the crime establishing the same facts as another exhibit is within the sound discretion of the trial court. *Id.* at 312, 384 S.E.2d at 796. We think that the photographs were relevant for the reasons advanced by the Commonwealth, and we find no abuse of the trial court's discretion in admitting them in evidence.

Passion, Prejudice, or Other Arbitrary Factor

[30] Williams argues that the introduction of "[t]he pictures of the charred bodies of the victims of the Prince Edward [County] killings" inflamed the jury so that "there was no question but that the jury would impose the death penalty after viewing them." However, we find nothing in the record to indicate that the jury disregarded the trial court's instruction to consider the photographs only for the purpose of showing Williams's "future dangerousness" in deciding the Cumberland County case.

[31] Additionally, Williams claims that "the passion and prejudice of the jury were further aroused by the Commonwealth's calling family members to testify during the sentencing hearing." We note that Mary Carter Williams, Mrs. Keller's mother, was the only family member called as a witness by the Commonwealth during the sentencing hearing. Mrs. Williams testified only as to her daughter's age and marriage to Mr. Keller and identified a photograph of the Kellers. The record does not disclose that Mrs. Williams displayed any particular emotion during the short period of her testimony.

Williams concludes that this was an indirect method of introducing inadmissible victim impact evidence, although Williams voiced no objection whatever to Mrs. Williams's testimony. We do not consider the testimony to have been victim impact evidence, nor does the record disclose that it aroused the passion of the jury, as Williams contends.

[32] Next, Williams suggests that the sentence was influenced by passion, prejudice, or other arbitrary factors because the jury imposed the death penalty despite his mitigating evidence. This evidence indicated that Williams suffered from a childhood mental disorder known as Attention Deficit Hyperactivity Disorder (A.D.H.D.), which adversely affected him in school and limited his ability to function in society as he matured. Dr. Dewey G. Cornell, a clinical psychologist, testified that persons suffering from A.D.H.D. are likely to be involved in substance abuse and engage in impulsive and sometimes illegal behavior.

Noting his own history, Williams contends that the effects of his disorder were exacerbated by his unstable home life and a sexual assault by an older man when Williams was 14 years old. Williams's mother, Carolyn Green Lipscomb, divorced his father shortly before he was born and married Arthur Williams, an alcoholic. Lipscomb divorced Arthur Williams after several years of verbal and emotional abuse. Thereafter, Lipscomb had several "relationships" with men, and Lipscomb testified that "not all [were] pleasant." However, one of those men, Dwayne Copeland, had a good "relationship" with Lipscomb, and she and Copeland planned to be married. When Copeland was killed in an automobile accident a few months before the planned marriage, Lipscomb testified that Williams was "devastated."

Williams points out that despite these difficulties, the testimony of his family members indicated that he was a caring, loving, generous, and dependable person who was not seen to be cruel or abusive to animals or to people. We have reviewed all of Williams's mitigating evidence and find nothing in it that would compel the jury to impose life sentences rather than death sentences.

Independent of Williams's specific complaints on this subject, we have also reviewed the record, as required by Code § 17–110.1, to ascertain if there is any indication that the jury, in imposing the death sentence, was influenced by passion, prejudice, or any other arbitrary factor. Our independent review discloses no such indication.

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Proportionality

[33] As required by Code § 17–110.1(C)(2), we also consider whether Williams's "death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the criminal." Prior to the Prince Edward County murders, Williams had no convictions for violent crimes, but he had several felony convictions for automobile theft and for possession of marijuana. However, we must also consider that Williams was the sole participant in the Prince Edward County murders and arson. Further, Williams suggested the robberies, the rapes, the execution-type killings of the Kellers, and the arson of their house. In our opinion, this evidence amply justifies the jury's finding of the "vileness" of the Keller murders and of Williams's "future dangerousness."

To assist us in our proportionality review, we have considered the compilation of the records of all capital murder cases reviewed by this Court pursuant to Code § 17–110.1(E). We have paid particular attention to those cases in which the death sentence was based on both the "vileness" and the "future dangerousness" predicates. These cases are collected in *Spencer*, 238 Va. at 319–20, 384 S.E.2d at 799–800. We have collected the cases since *Spencer* in *Mueller*, 244 Va. at 413–14, 422 S.E.2d at 397. Since *Mueller*, the following cases have imposed death sentences based on both predicates: *Burket v. Commonwealth*, 248 Va. 596, 450 S.E.2d 124 (this day decided); *Breard*, 248 Va. at 89, 445 S.E.2d at 682; and *Mickens*, 247 Va. at 412, 442 S.E.2d at 689.

Based upon our review of these records, as well as of cases in which life sentences were imposed, we conclude that Williams's death sentences are not excessive or disproportionate to the penalties imposed by other sentencing bodies in Virginia for similar conduct, considering both the crimes and the defendant.

IX. CONCLUSION

We find no reversible error in the judgments of the trial court, and we perceive no other reason to set aside the sentences of death. Accordingly, we will affirm the convictions and sentences involved in these appeals.

Affirmed.

Lonnie WEEKS, Jr.,

v.

COMMONWEALTH of Virginia.

Record No. 940335.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant was convicted in the Circuit Court, Prince William County, Herman A. Whisenant, Jr., J., of grand larceny and firearms charges, and capital murder, and was sentenced to death. On automatic death penalty review, the Supreme Court, Compton, J., held that: (1) two-hour detention while defendant was being questioned by police officers occurred pursuant to defendant's consent and defendant's questioning after prior invocation of right to remain silent did not violate his Fifth Amendment rights; (2) trial court did not err in refusing to dismiss juror for cause; (3) victim impact testimony is relevant to punishment in capital murder prosecution; and (4) death sentence was appropriate under the circumstances.

Affirmed.

1. Criminal Law ⇐1134(3)

On review of death sentence, court considers not only trial errors enumerated by defendant but also whether sentence of death was imposed under influence of passion, prejudice, or any other arbitrary factor, and whether sentence is excessive or disproportionate to penalty imposed in similar cases. Code 1950, § 17–110.1, subd. A.

COPY

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CUMBERLAND

COMMONWEALTH OF VIRGINIA

v.

MICHAEL WAYNE WILLIAMS

THE HONORABLE JOHN R. SNODDY, JR., PRESIDING

Trial - Day One
Cumberland, Virginia
January 3, 1994

* * * * *

TEKKI H. SPRUCE
Court Reporter
P. O. Box 4238
Lynchburg, Virginia 24502

(804) 239-9672

Bonnie E. Stinnett; Ruby Trent Carter.

MR. FORD: For the record, too, I think sometimes the people up there just kind of nod their heads, and maybe if we could get them to respond yes -- I mean, even if they all jointly respond. I don't know whether the record is being picked up or not. I think Mr. Carnes just kind of sat there and --

THE COURT: Well, you don't have to worry about him now.

MR. FORD: I understand that, Judge.

THE COURT: I'll certainly ask them to.

(The three prospective jurors entered the Courtroom and were sworn by the Deputy Clerk.)

THE COURT: State your name.

MR. CHICK: Dwayne Chick.

THE COURT: What's your name?

MS. CARTER: Ruby Carter.

MS. STINNETT: Bonnie Stinnett.

THE COURT: Now, I want all of you all to answer these questions when you are asked questions. See, it has to go on the record, so speak up. If I ask you something, don't shake your head or anything, just answer yes or no. And if I ask you something else, to elaborate, then you can

do that. This involves, again, Commonwealth versus Michael Wayne Williams. He's charged with twelve felonies. Included is capital murder, or rather murder involved with rape. He's also charged with arson, and robbery, and abduction of Mr. and Mrs. Keller. And I have the following questions for you: Are you related by blood or marriage to the defendant, Michael Wayne Williams, or the alleged victims of these offenses, Morris C. Keller, Jr. and Mary Elizabeth Keller, or any of the attorneys, Mr. Woodson, Mr. Von Schuch, Mr. Ford, or Ms. Carrico?

JURORS: (No affirmative response.)

THE COURT: Are you related by blood or marriage to any of these people?

JURORS: (No affirmative response.)

THE COURT: Have any member of your immediate family ever been represented by the aforementioned attorneys?

JURORS: (Two have no affirmative response.)

MR. CHICK: Yes.

THE COURT: Who have you been represented by?

MR. CHICK: My daddy's been represented by --

THE COURT: I'm not talking about your daddy. I asked you if you had ever been represented.

MR. CHICK: Oh, no, sir.

THE COURT: Are you personally acquainted with

the defendant or were you personally acquainted with the deceased victims?

MR. CHICK: Yes, I knew them. They used to be my neighbors.

THE COURT: Who?

MR. CHICK: The Kellers.

THE COURT: Would that have any effect on your ability to serve as an impartial juror in this case?

MR. CHICK: No.

THE COURT: Have you or any member of your immediate family ever been the victim of a murder, robbery or rape?

JURORS: (No affirmative response.)

THE COURT: Do you have any interest in this trial or the outcome of the case?

MR. CHICK: Yes, I --

THE COURT: What?

MR. CHICK: I mean, yeah. Yes.

THE COURT: Gentlemen, do you have any suggestion?

MR. FORD: If I might talk with my client just a minute?

THE COURT: I don't want to taint the other jurors.

MR. VON SCHUCH: Judge, talking with Mr. Ford, I

thought we might do it mutually, but I think Mr. Ford would like to ask him just a few questions to verify some things before he agrees to anything. So I guess what we would do at this point is just go ahead and continue with the questioning and then --

THE COURT: Then we'll talk about that afterwards.

MR. FORD: That's fine, Judge.

THE COURT: Have you acquired any information about any of these offenses of the defendant, Michael Wayne Williams, from the news media or any other source? That is, have you read any reports on this case in any newspaper or heard any reports on this case either on the radio or television?

MS. STINNETT: I have not.

MS. CARTER: I've heard it on the radio and in the newspaper.

MR. CHICK: I've heard it on the radio.

THE COURT: Have you formed any opinion as to the guilt or innocence by virtue of what you have heard or read?

JURORS: (No affirmative response.)

THE COURT. Considering what you have read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is

consideration of the evidence?

JURORS: (No affirmative response.)

THE COURT: Are any of you involved in law enforcement?

JURORS: (No affirmative response.)

THE COURT: Are any of you related to the following people who may be called as witnesses: Robert W. Scanlon; Lisa C. Schiermeier; Ann D. Jones; Deborah Kay; Robert R. Hallett; William Massello, III; John Howard Williams; George Li, Li; Special Agent R. A. Jenkins; Special Agent William C. Hicks; Special Agent Richard Holt; Special Agent James Tyree; Verena Ann James; Jose Albert Lozano; Barbara Waycaster Dunn; Robert Dean Ramey; Tammy Lynn Tolley; Elizabeth K. Jones; Sharon Lee Sine; David Edward Sine; Special Agent Wayne Hipkins; Jeffrey Alan Cruse; Deputy Sheriff Claude Meinhard; Special Agent Herbert Chambers; Special Agent James Adcock; Trooper John Evers; Glenn Haskins; Special Agent M. Joseph Ritchie; Mary Carter Williams; Raymond J. Williams; Patricia Costable Atkinson; Agnes Villalobos; Special Agent Barry Keesee; Agnes Devina Piper; Mary Nieves; Richard B. Horn, Jr.; Martha Keller; James Keller; Carolyn Lipscomb; John Williams; Warren Green; Janet McCoy; Laura St. John; Gwen Marshall; Arthur Howard Williams; Thomas Spry; Dr. Dewey Cornell?

we got to my mother's house, I took the .38 and I threw it in the woods. That's where the gun is now. I threw it in the woods behind the house.

Q At the point in the thicket, you're telling the Jury that you fired how many times?

A One time.

Q And with what weapon?

A The .38.

Q Have you ever been convicted of a felony?

A Yes, I have.

Q How many?

A Two felonies.

Q Have you ever been convicted of a misdemeanor involving lying, cheating or stealing?

A One.

MR. FORD: That's all I have.

CROSS EXAMINATION

BY MR. VON SCHUCH:

Q Mr. Williams, do you know what a Motion to Exclude Witnesses is?

A No, I do not.

Q Have you been watching the trial as we've been going along here?

A What, on T.V.?

Q No, right here in the courtroom.

A Pretty much, I mean.

Q Where have all the witnesses been coming from?

A Outside.

Q So that when the witness came in, they didn't get a chance to hear who testified before them, did they?

A What do you mean?

Q In other words, they were outside?

A Right.

Q So they didn't get a chance to hear who testified before them, did they?

A They did not.

Q And then they would testify and they'd go back out, wouldn't they?

A Yes, sir.

Q So none of those witnesses have heard anything that was said in this courtroom other than what they told this Jury; is that right?

A Right.

Q But that's not true in your case, is it?

A What do you mean?

Q You're the only witness who has sat in here through this trial and heard the testimony of every witness

before you got to testify; isn't that correct?

MR. FORD: Judge, I think that's --

THE WITNESS: Well, I had to.

MR. FORD: Excuse me. I think that's improper. He has a constitutional right to be here at all stages of the trial, and it was my Motion to Exclude Witnesses. He's trying to use that fact to convince this Jury that he has been exercising his constitutional rights to stay here and confront all of his accusers and see everybody, and I think that that's improper. I think it's improper.

MR. VON SCHUCH: Judge, I think he's giving me more credit than I'm entitled to.

MR. FORD: I apologize if I have.

MR. VON SCHUCH: I think the Jury ought to have pointed out to them that this witness had occasion to hear all of the other testimony before he testifies. His credibility is in issue and where his story comes from, they have a right to determine and decide.

MR. FORD: But I don't think you can beat him over the head with his constitutional rights. That's certainly a right of his.

THE COURT: Well, he can't beat him over the

head, certainly, for being in here, but he can ask him if he heard all the other testimony.

BY MR. VON SCHUCH: (Continuing)

Q And your answer to that question would be yes?

A Yes, sir.

Q Now, I think you've indicated to Mr. Ford you are a convicted felon?

A Yes, sir.

Q Two times?

A I think that's what it is, what my record said. I might be wrong. This is what my record said; that's what I saw.

Q Let me ask you this. You indicated that when you were picked up in Richmond, your brother came and picked you up; is that correct?

A Yes, sir.

Q And your brother's name is Johnny Williams?

A Yes, sir.

Q You indicated that you took him aside, I believe, outside the presence of Mr. Cruse?

A Me, him and Cruse walked over there.

Q Was Mr. Cruse present when you told your brother the first story about what happened?

Mr. Cruse had that goddamn .357." Now why does he do that? Because he knows that that .357 can be matched up with a bullet from Mrs. Keller. He knows that and he's going to put that .357 -- And that's the only time he's told you the truth. He's going to put it in Mr. Cruse's hand because he knows where the .38 is. We don't have the .38 today. That .38 is not here. He knows it, he knows the .38 is not here and that we have no way of getting ballistics on it.

But let me tell you something. He sat right here -- and he's got a right to do it -- and he listened to everybody. Mr. Cruse didn't have that right to sit here and listen to everybody. He came in and told you as it was and it was corroborated right down the line on everything he said. You heard the witnesses, honest witnesses, believable witnesses, that showed you that Mr. Cruse is believable. He's telling it like it is. And Mr. Williams had his right to sit in here and listen to everything that happened.

And guess what? After he listens to everything, after he's told Mr. Holt that, "I can put that goddamn .357 in Mr. Cruse's hand," what does he do? He gets on there and tells you, "Huh-uh, wait a minute. I'm going to change my story some now. He grabbed the .38 from me." He knows he's got to get that .38 out of his hand. He can't say he had that .38. Now he's telling you that

and you steal things, when you break into their cars and steal things, it's finding. That's what Michael Williams is like. Jeffrey Cruse is different. Not different enough that he wouldn't do the same things Michael Williams did, but different enough to feel bad about it, different enough to talk to the police about it.

He told you about an incident that occurred several weeks ago when I had laid out one of those pictures which you had seen of the Kellers in the woods. I asked him what happened and he said he lost it, and, boy, did he ever. And when he got on the witness stand here, he broke down again, when Mr. Ford pushed him and then when he was asked questions by me.

When he was arrested on that concealed weapon charge, and you heard the officers testify, there wasn't a single thing that they could have charged him with about these offenses, not a single thing, but he went ahead anyhow and told the police and got himself charged with it. Apparently Mr. Cruse feels bad. He at least has that much conscience. And that is a big difference between this (indicating defendant) and Mr. Cruse.

Mr. Ford is absolutely correct. When Mr. Cruse came down the first time, when he wanted to talk, when he told us, when we had no choice but to enter into that agreement, because anything he said we were going to

charge him with, because we didn't have any other way of charging him, and he did not tell about the rape and Mr. Woodson went back and tore up the agreement. And he sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. And like he told you right now, his back is against the wall; if he lies, he dies, and that is his situation.

And that's where he's coming from when he comes into this courtroom. Now he's different, you see, from Mr. Williams, because Mr. Cruse's testimony makes Mr. Williams guilty of capital murder, makes him guilty of rape. If Mr. Williams does not lie, he is guilty of these offenses. There is a difference between the two of them. The last question I asked Mr. Williams on cross examination was, "The truth of it is, Mr. Williams, the truth of it is that if Jeff Cruse hadn't told on you, you wouldn't be here on trial today, would you?" And he said that's the truth.

Now where is Mr. Williams coming from? You don't think he doesn't have a motive to get back at Jeff Cruse? You don't think he doesn't sit there with that on his mind? If Jeff Cruse hadn't told the police what happened and hadn't taken them to the river, this man is walking around out there and he's still got his .38. Think about what's in Mr. Williams' mind when he's up here telling you this story.

(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear convincing evidence that but for constitutional error, no reasonable factfinder w have found the applicant guilty of the underlying offense.

(4)

ORIGINAL

Supreme Court, U.S.
FILED
OCT 21 1999
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No. 99-6615
99A307

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE WILLIAMS,

Petitioner

v.

JOHN B. TAYLOR, WARDEN,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and on Application for Stay of Execution

---

RESPONDENT'S BRIEF IN OPPOSITION

MARK L. EARLEY
Attorney General of Virginia

***DONALD R. CURRY**
Senior Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

***Counsel of Record**

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QUESTIONS PRESENTED

1. Does the Fourth Circuit's conclusion – that Williams' "improper cross-examination" claim would create an impermissible "new rule" and, in any event, would amount to harmless error under Brecht v. Abrahamson – render the ultimate outcome of this Court's decision in Portuondo v. Agard irrelevant to Williams' petition?

2. Does the Fourth Circuit's conclusion – that Williams was not entitled to a federal evidentiary hearing even under pre-AEDPA law – render moot Williams' "conflict" argument regarding the proper interpretation of AEDPA's § 2254(e)(2)?

3. Is there any "compelling reason" to review the Fourth Circuit's straightforward interpretation of 21 U.S.C. § 848(q)(9), in view of the fact that the court below is the only federal appeals court to have decided the issue?

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STATEMENT OF THE CASE

Michael Williams has been sentenced to death for premeditatedly murdering six people while on parole during a two-month period spanning from late December of 1992 to late February of 1993. The Virginia Supreme Court found the facts surrounding the capital murders of Mr. and Mrs. Morris Keller to be as follows:

> Between 9:30 and 10:30 p.m., on Saturday, February 27, 1993, Verena Lozano James drove [Michael] Williams and [Jeffrey] Cruse to a rural area in Cumberland County and left them approximately one-half mile from Bear Creek Market. Williams and Cruse planned to rob persons in the market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.
>
> The two men walked to the store, but found it closed. Williams suggested that "he knew a house where we can go; they'd have a couple thousand dollars." Cruse agreed, and they walked some distance to the Kellers' house. Upon arrival at the Kellers' house, Cruse returned the Black Hawk revolver to Williams and Cruse knocked on the door. When Mr. Keller opened the door, Williams pointed the gun at him and both men entered the house.
>
> Williams ordered the Kellers to remove all their clothes, and he remained in the kitchen with them while Cruse began searching the house for money and other valuables. After Cruse found a fully loaded .38 caliber handgun, Williams decided "to tie [the Kellers] up," and Cruse did so. The Kellers were then placed, first in one closet and later in separate closets, and both men resumed their search.
>
> After the two men had assembled some of the Kellers' property in the living room, at Williams's suggestion, first Williams, then Cruse, raped Mrs. Keller. Afterwards, Williams ordered both Kellers to take showers and put on clean clothes, which they did. Williams then directed the Kellers to "take a walk" with them. Upon hearing that the two men planned to burn the house, Mrs. Keller took the Kellers' marriage certificate with her. As the Kellers, Williams, and Cruse left the house and walked "[d]own on a dirt road and into a thicket," Williams was carrying the .38 caliber handgun and Cruse was carrying the Black Hawk revolver.
>
> When they were in the thicket with Williams standing behind Mr. Keller and Cruse standing behind Mrs. Keller, Williams said, "We'll shoot at the count of three." Upon Williams's count of three, he shot Mr. Keller with the .38 caliber handgun and Mr. Keller fell to the ground. However, Cruse did not shoot Mrs. Keller. Williams told Cruse to shoot Mrs. Keller because "he didn't want to leave no witnesses." Cruse then shot Mrs. Keller once with the Black Hawk revolver. After Mrs. Keller fell, Mr. Keller stood up and Williams shot him again with the .38 caliber handgun. As Cruse started to walk away, Williams said, "Wait...[w]hat if they ain't dead?", and he shot each of the Kellers "a couple more times apiece" with the .38 caliber handgun.
>
> The two men returned to the house, where they loaded a television set, microwave oven, shotgun, stereo set, and speakers into Mr. Keller's jeep and, at Williams's suggestion, set fire to the house. Williams and Cruse then took the jeep to Fredericksburg, where they sold some of the stolen property the next day. They then threw the remaining stolen property and the Black Hawk revolver into the Rappahannock River and set fire to the jeep.
>
> Upon hearing of the Keller fire on Monday morning, Verena James advised the police that she had taken Williams and Cruse to an area not far from the Keller house on the night of the fire. Consequently, the police sought to question the two men regarding the fire. Williams and Cruse returned to Cumberland County the Monday following the murders and the police were able to question Cruse. Williams, however, fled to Florida.
>
> At first, Cruse furnished no information of value to the police. However, after the police discovered the bodies of the Kellers on Tuesday, Cruse consulted counsel. His counsel obtained a conditional agreement from the Commonwealth that it would not seek the death penalty provided Cruse gave a truthful statement of his knowledge of the crimes. Cruse then furnished information that implicated both men in all of the crimes charged, except for Cruse's role in Mrs. Keller's rape. Because Cruse breached his agreement in failing to tell the police that he had raped Mrs. Keller, the Commonwealth also indicted him for the Kellers' capital murders.
>
> Testifying in his own defense, Williams agreed with Cruse: (1) that Williams was the one who suggested robbing persons at the store; (2) that Williams was the first one to shoot Mr. Keller and that Cruse was the first one to shoot Mrs. Keller; and (3) that it was Williams's idea to burn the Keller house. However, Williams (1) denied that he raped Mrs. Keller; (2) claimed that Cruse fired all the subsequent shots into the Kellers' bodies, and (3) contradicted other details of Cruse's testimony about who had suggested some of their activities during and after the murders.

> Lisa C. Schiermeier, a serologist, tested the seminal fluid recovered from Mrs. Keller's vagina as a part of the Physical Evidence Recovery Kit prepared by Dr. Deborah Kay, an assistant chief medical examiner who performed the autopsy on Mrs. Keller. Schiermeier compared that sample with the blood types of Cruse, Williams, and Mr. Keller. Schiermeier testified that her comparison indicated only Williams could have contributed a certain type of seminal fluid found in the sample.[1] Dr. George C. Li, a DNA expert who performed a DNA test on the spermatozoa from the sample, testified that his test results were consistent with a conclusion that Cruse and Williams jointly contributed the seminal fluid.

Williams v. Commonwealth, 450 S.E.2d 365, 369-370 (Va. 1994). See § 2254(e)(1) (state court findings of fact must be presumed correct and petitioner may overcome presumption only by clear and convincing evidence); see also Sumner v. Mata, 449 U.S. 539, 541-549 (1981) (statutory presumption of correctness applies to state appellate court's recitation of historical facts).

On January 6, 1994, after a four-day trial, a jury in Cumberland County, Virginia, convicted Williams of burglary, rape, arson, two counts of robbery, two counts of abduction, and five counts of capital murder. On the non-capital charges, the jury fixed Williams' punishment at 20 years for the burglary, life imprisonment for the rape, 50 years and a $100,000 fine for the arson, 40 years for each of the robberies, and 10 years for each of the abductions. On that same date, the trial court imposed these sentences and entered final judgment on the non-capital charges.

After a separate penalty proceeding, the jury sentenced Williams to death for the capital murders of both Mr. and Mrs. Keller, finding in both instances that Williams represented a continuing serious threat to society ***and*** that his offense was outrageously or wantonly vile, horrible

[1] Williams erroneously asserts that "[f]orensic tests...determined that if there was only one sperm donor, it was Cruse." (Ptn. 5 n.4). The forensic analysis detected the presence of "PGM subtype 2-" on Mrs. Keller's vaginal swab. (Resp. App. 3). Of Williams, Cruse and Mr. and Mrs. Keller, only the petitioner possessed the "PGM subtype 2-" enzyme. (Resp. App. 4).

or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. See Va. Code § 19.2-264.4. The trial judge conducted yet another sentencing proceeding on February 22, 1994, at which the court considered additional evidence introduced on Williams' behalf. At the conclusion of that hearing, however, the court imposed both death sentences.

Williams' capital murder convictions and death sentences were affirmed by the Supreme Court of Virginia on November 4, 1994. Williams v. Commonwealth, 450 S.E.2d 365 (Va. 1994). With respect to the additional aggravating evidence which warranted Williams' death sentences, the state court found as follows regarding four other murders committed by petitioner:

> Williams confessed to John Howard Williams, his brother, that [in December of 1992] he had shot and killed...four men [in Prince Edward County] and set fire to the house [where he left the victims' bodies]. The court permitted the Commonwealth to introduce photographs of each victim's head showing that each had been shot in the head and that parts of the head were partially burned.
>
> * * *
>
> ...Prior to the Prince Edward murders, Williams had no convictions for violent crimes, but he had several felony convictions for automobile theft and for possession of marijuana. However, we must also consider that Williams was the sole participant in the Prince Edward County murders and arson.[2] Further, Williams suggested the robberies, the rapes, the execution-type killings of the Kellers, and the arson of their house. In our opinion, this evidence amply justifies the jury's finding of the "vileness" of the Keller murders and of Williams's "future dangerousness."

Williams, 450 S.E.2d at 377, 379. Once again, the state court's findings of historical fact must be presumed correct. See also § 2254(e)(1); Sumner v. Mata. Williams requested rehearing, but the Virginia Supreme Court denied his petition on January 13, 1995.

[2] At final sentencing before the trial judge, Williams admitted his responsibility for the Prince Edward County murders. (JA 356-357). ["JA ___" references are to the joint appendix in the Fourth Circuit, a copy of which has been lodged with this Court]. Williams subsequently pleaded guilty to capital murder and three counts of first-degree murder in Prince Edward and was sentenced to four terms of life imprisonment plus fourteen years.

Williams then filed a petition for a writ of certiorari. This Court, however, denied the petition on June 26, 1995, thus marking the end of Williams' direct appeal. Williams v. Virginia, 515 U.S. 1161 (1995).

On August 10, 1995, the state trial court appointed an experienced attorney to represent Williams in his state habeas corpus proceedings. Williams filed an initial habeas petition in the Virginia Supreme Court on August 30, 1995. On December 15, 1995, however, the Supreme Court granted Williams' request for leave to file an amended petition. On January 29, 1996, he filed a 200-page amended petition, raising over 60 habeas claims. The Virginia Supreme Court dismissed Williams' amended petition on March 18, 1996. Williams' subsequent petition for a writ of certiorari again was denied by this Court. Williams v. Netherland, 519 U.S. 877 (1996).

On May 14, 1996, pursuant to Virginia Code § 53.1-232.1, the trial court set Williams' execution for July 11, 1996. On July 3, 1996, however, the United States District Court for the Eastern District of Virginia granted Williams' request for a stay of execution. Williams filed his federal petition on November 20, 1996, approximately seven months after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). On July 16, 1997, the district court denied Williams' request for discovery, specifically finding that he had failed to establish "good cause" as required by Rule 6(a), Rules Governing Section 2254 Cases. On April 13, 1998, the district court dismissed all of Williams' habeas claims except for three claims which the lower court initially thought warranted an evidentiary hearing.

On April 20, 1998, the Warden filed a motion for summary judgment. On May 15, 1998, the district court denied Williams' renewed request for discovery, declined to rule on the Warden's motion for summary judgment and scheduled the evidentiary hearing for a date certain. The Warden then filed a petition for a writ of mandamus and prohibition, asking the United States Court of Appeals for the Fourth Circuit to require the lower court to determine whether Williams' three

claims warranted an evidentiary hearing under AEDPA's 28 U.S.C. § 2254(e)(2). On May 27, 1998, the Fourth Circuit stayed the district court's order awarding Williams an evidentiary hearing and directed the lower court to apply § 2254(e)(2) to Williams' claims.[3] On remand, the district court applied § 2254(e)(2) to Williams' claims, determined that he was not entitled to a hearing and dismissed Williams' petition in its entirety. Williams v. Netherland, 6 F. Supp. 2d 545 (E.D. Va. 1998).

Williams filed a Rule 59(e) motion to alter or amend which the district court denied on November 12, 1998. Williams then filed yet another Rule 59(e) motion which the district court denied on December 15, 1998.

On August 2, 1999, the Fourth Circuit affirmed the district court's denial of relief. Williams v. Taylor, ___ F.3d ___ (4th Cir. 1999). (Ptn. App. 2-8). On August 27, 1999, the Court of Appeals denied Williams' petition for rehearing and rehearing en banc. (Ptn. App. 1). Pursuant to Virginia Code § 53.1-232.1(iii), on September 1, 1999, the state trial court scheduled Williams' execution for October 28, 1999. The Fourth Circuit denied Williams' request for a stay of execution on October 14, 1999.

REASONS WHY THE WRIT AND A STAY SHOULD BE DENIED

I. THIS COURT'S ULTIMATE DECISION IN PORTUONDO v. AGARD CAN HAVE NO EFFECT ON THE FOURTH CIRCUIT'S REJECTION OF WILLIAMS' SIXTH AMENDMENT CLAIM REGARDING THE PROSECUTOR'S CROSS-EXAMINATION.

Petitioner contends that the prosecutor violated his Sixth Amendment right to be present and to confront adverse witnesses by cross-examining him about the obvious fact that he had

[3] The Court of Appeals did not issue a writ of mandamus or prohibition, but the Warden's request for such a writ remained pending in the Fourth Circuit until it was dismissed as moot at the conclusion of the district court proceedings.

heard all of the other witnesses testify before he testified at the guilt stage of trial. According to Williams, at the very least this Court should grant him a stay of execution pending the outcome of this Court's review of the Second Circuit's decision in Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997), modified on rehearing, 159 F.3d 98 (2d Cir. 1998), cert. granted, 119 S.Ct. 1248 (1999). This Court's ultimate decision in Agard, however, will have no impact upon the validity of the Fourth Circuit's rejection of petitioner's claim.

The Court of Appeals did not reach the merits of Williams' Sixth Amendment claim. Instead, the Fourth Circuit correctly ruled that the granting of collateral relief upon such a claim would violate the "new rule" doctrine. See Williams, ___ F.3d at ___. (Ptn. App. 7). The Court of Appeals also concluded that, even if the "new rule" doctrine did not apply, any error by the prosecutor was harmless under the controlling standard on collateral review. Id. at ___, applying Brecht v. Abrahamson, 507 U.S. 619 (1993). (Ptn. App. 7).

In Agard, this Court granted the State's petition to review the merits of the Second Circuit's conclusion that a trial prosecutor's ***jury argument*** violated the Sixth Amendment and due process by asserting that a defendant's testimony is less credible simply by virtue of the fact that he testified after having heard all the other witnesses testify. New York has not raised a "new rule" defense in this Court.[4] (See New York's Brief in Portuondo v. Agard, No. 98-1170 at pp. 13-16). The granting of certiorari in Agard, therefore, can have no adverse effect on the validity of the Fourth Circuit's judgment that Williams is seeking an impermissible "new rule" or the Court of Appeals' judgment that any possible error in his case was harmless under Brecht's

[4] New York did not raise a "new rule" defense until its petition for rehearing in the Second Circuit, which expressly declined to consider the issue because it had been raised too late. See Agard, 159 F.3d at 99-100. New York chose not to raise a "new rule" argument in either its petition for a writ of certiorari or its subsequent merits briefs in this Court.

"substantial and injurious effect or influence" standard.[5] See generally Black v. Cutter Laboratories, 351 U.S. 293, 297-298 (1956) (purpose of certiorari is to review "judgments, not statements in opinions").

The Fourth Circuit's conclusion that Williams' claim is barred by the "new rule" doctrine clearly does not warrant this Court's review. Indeed, this Court's granting of certiorari in Agard to decide ***whether*** the prisoner's claim in that case has any merit demonstrates the correctness of the Fourth Circuit's decision that such a claim cannot prevail on federal collateral review where, as here, the State is asserting the "new rule" defense. As the Fourth Circuit found, neither of the cases upon which Williams relies – Griffin v. California, 380 U.S. 609 (1965), and Brooks v. Tennessee, 406 U.S. 605 (1972) – "compels" or "dictates" the granting of relief upon his Sixth Amendment claim.[6] See Williams, ___ F.3d at ___. (Ptn. App. 7). Indeed, in the district court,

[5] Agard, moreover, also is distinguishable from Williams' case because the Second Circuit carefully limited its decision to claims based upon a prosecutor's ***jury argument***, as opposed to cross-examination. See Agard, 117 F.3d at 708 ("We...express no opinion as to the...constitutionality of similar remarks made during cross-examination"); id. ("summation remarks raise constitutional issues which either are not present or are of less concern when made upon cross-examination"). At no time in state court did Williams ever object to the prosecutor's jury argument, as opposed to cross-examination. Indeed, no such claim was ever raised in the district court or the court below. His belated attempt to focus upon the prosecutor's jury argument (Ptn. 6, n.5) in order to make the claim fit the Agard mold clearly is barred by his procedural default. See generally Breard v. Greene, 118 S.Ct. 1352, 1354 (1998) (claims never raised in state court are barred from federal habeas review). Petitioner's case also is distinguishable from Agard because on rehearing in that case the Second Circuit expressly retreated from any suggestion "that it is constitutional error for a prosecutor to make a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own...testimony." See Agard, 159 F.3d at 99. No such "factual argument" was made in Agard, where the prosecutor focused "solely on [the defendant's] presence in the courtroom." Id. In Williams' case, the prosecutor's argument to the jury, not only was unobjected to, but made a specific, fact-based assertion that Williams had tailored his testimony based upon the testimony of the prosecution witnesses which he had heard before taking the witness stand. (JA 303-305).

[6] Federal collateral relief also would be barred under 28 U.S.C. § 2254(d) (forbidding federal habeas relief unless state court decision "unreasonable" under existing precedent).

Williams acknowledged as much by asserting merely that the rule he is seeking is "implicit" in this Court's prior decisions. (Resp. App. 6). To the contrary, this Court expressly recognized in Brooks that the risk that a defendant may color his testimony based upon having heard other witnesses testify is a matter best left to the jury's role in assessing the credibility of witnesses. See Brooks, 406 U.S. at 611.

Finally, the Fourth Circuit's fact-specific application of Brecht's clearly-established harmless error standard to petitioner's claim does not warrant this Court's review. See U.S.S.Ct. Rule 10 ("certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law"); Kyles v. Whitley, 514 U.S. 419, 460 (1995) (Scalia, J.) ("an intensely fact-specific case in which the court below unquestionably applied the correct rule and did not unquestionably err [is] precisely the type of case in which we are ***most*** inclined to deny certiorari") (emphasis in original). Here, the Fourth Circuit correctly stated the Brecht standard and reasonably concluded that, in view the of "devastating" impact of Williams' highly inculpatory testimony on direct examination, the prosecutor's subsequent cross-examination regarding his having heard all the other witnesses testify before he testified could not have had the required "substantial and injurious effect or influence" upon the jury's verdict.[7] See

[7] It is undisputed that Mr. and Mrs. Keller were murdered premeditatedly during the course of a robbery in which Williams was a full and willing participant. It also is undisputed that Mrs. Keller was raped. And, as the Virginia Supreme Court noted, while the testimony of Williams and his co-defendant was at odds on some of the details of the crimes, ***Williams admitted before the jury that he initiated the idea of a robbery, that it was his idea to burn down the victims' house and, most importantly, that he shot Mr. Keller in the head after both victims were marched into the woods behind their home to be executed***. See Williams, 450 S.E.2d at 370. Thus, as both the district court and the Fourth Circuit concluded, by Williams' own admission he was guilty of a premeditated murder during the commission of a robbery, subsequent to the commission of a rape and during the same act or transaction where another premeditated murder occurred. Williams, ___ F.3d at ___ (Ptn. App. 5); Williams, 6 F. Supp. 2d at 548 (Ptn. App. 18-19); see generally Briley v. Commonwealth, 273 S.E.2d 57, 63 (Va. 1980) ("It is only necessary to prove that the defendant was the triggerman in the murder and an accomplice in the robbery or rape to convict him of capital murder"). Williams is simply wrong when he asserts that he "could be convicted of the capital

Williams, ___ F.3d at ___. (Ptn. App. 7). There is no "compelling reason" to review such a fact-specific application of a correctly stated principle of established law.

II. PETITIONER'S CONTENTION ABOUT AN ALLEGED "CONFLICT" REGARDING THE INTERPRETATION OF § 2254(e)(2) IS MOOT BECAUSE THE FOURTH CIRCUIT RULED THAT HE WAS NOT ENTITLED TO A FEDERAL EVIDENTIARY HEARING EVEN UNDER PRE-AEDPA LAW.

According to Williams, this Court should stay his execution and grant certiorari because the Fourth Circuit's interpretation of § 2254(e)(2) in his case supposedly creates a "conflict" with the decisions of every other court of appeals that has interpreted the statute. (Ptn. 27). This argument must fail, however, ***because the Fourth Circuit's judgment – that Williams is not entitled to a federal evidentiary hearing – would remain precisely the same even if § 2254(e)(2) never had been enacted***. Obviously, this Court should not grant certiorari or stay Williams' execution in order to review an issue that will not affect the Fourth Circuit's decision to deny collateral relief. See generally Black v. Cutter Laboratories, 351 U.S. at 297-298 (purpose of certiorari is to review "judgments, not statements in opinions").

The Fourth Circuit did conclude that the district court correctly had decided that § 2254(e)(2) barred a federal evidentiary hearing on Williams' two claims involving Juror Bonnie Stinnett and his claim involving the prosecution's alleged failure to disclose a psychological report involving the testifying co-defendant, Jeffrey Cruse, ***none of which ever had been raised***

murder of Mr. Keller only if the jurors concluded [that] Williams' one [admitted] shot resulted in a fatal wound." (Ptn. 21 n.11). As the Fourth Circuit noted, the medical examiner "testified that each gunshot wound suffered by Mr. Keller contributed to his death." Williams, ___ F.3d at ___. (Ptn. App. 5).. Thus, Williams' admission under oath that he fired the first shot into Mr. Keller's head clearly satisfied the requirement of Virginia law that the defendant played a "direct part" in causing the victim's death. See Strickler v. Commonwealth, 404 S.E.2d 227, 235 (Va.), cert. denied, 502 U.S. 944 (1991).

in state court. See Williams, ___ F.3d at ___. (Ptn. App. 4-5). The Court of Appeals' published opinion, however, clearly demonstrates that the outcome of Williams' case would be the same regardless of how § 2254(e)(2) is interpreted or whether it is applied to Williams' claims: "Even were section 2254[(e)(2)] not to apply, Williams would be unable to show his eligibility for a hearing under pre-AEDPA law." Id. at ___. (Ptn. App. 5). The Fourth Circuit then applied the pre-AEDPA standard established by this Court in Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), and concluded that "Williams can show neither cause for nor prejudice from his failure to raise the aforementioned Sixth Amendment and Brady claims in state court." See Williams, ___ F.3d at ___. (Ptn. App. 5). Thus, regardless of how the district court and the Fourth Circuit interpreted § 2254(e)(2) and, regardless of Williams' arguments as to why the statute should not have been applied to his claims, such matters clearly are irrelevant to the ultimate disposition of Williams' case.[8]

[8] Although the Fourth Circuit's interpretation of § 2254(e)(2) is a moot point for purposes of Williams' certiorari petition, the court below clearly was correct in applying § 2254(e)(2) to Williams' claims ***because they never were raised in state court and, therefore, are defaulted***. See Breard v. Greene, 118 S.Ct. at 1355 (citing § 2254(e)(2) for the proposition that Breard could not develop facts at a federal evidentiary hearing regarding a treaty claim he never raised in state court). The Fourth Circuit's application of § 2254(e)(2) to such defaulted claims is not, as Williams contends, in "conflict" with the decisions of other federal appeals courts. (Ptn. 27-28). All of the cases cited by Williams as support for such a "conflict" dealt with claims that the prisoner, in fact, had raised in state court and preserved for federal review. See Miller v. Champion, 161 F.3d 1249, 1251-1252 (10th Cir. 1998) (same ineffective counsel claim had been raised in state collateral proceeding); McDonald v. Johnson, 139 F.3d 1056, 1058 (5th Cir. 1998) (same); Burris v. Parke, 116 F.3d 256, 257 (7th Cir. 1997) (same); Jones v. Wood, 114 F.3d 1002, 1007, 1012 (9th Cir. 1997) (same); Love v. Morton, 112 F.3d 131, 136 (3d Cir. 1997) (same double jeopardy claim had been raised in state court on direct appeal). If, unlike the Fourth Circuit, a lower federal court ruled that § 2254(e)(2) did not apply to a claim never raised in state court, there would be a "conflict," but it would be a conflict with this Court's decision in Breard where, just as in petitioner's case, there was no discovery or evidentiary hearing during the state habeas proceedings because the prisoner simply never had raised the claim in state court.

Petitioner also contends, of course, that the Fourth Circuit wrongly concluded that he had failed to satisfy Keeney's "cause and prejudice" standard. (Ptn. 31-33). This argument, however, amounts to nothing more than the all-too-common allegation that the court below erred in applying established law to the particular facts of a petitioner's case. See Rule 10 ("A petition...is rarely granted when the asserted error consists of...the [alleged] misapplication of a properly stated rule of law"). The "cause and prejudice" standard unquestionably is firmly-established, and this Court should not grant certiorari merely to review the Fourth Circuit's fact-specific application of that standard to petitioner's claims.

Much of Williams' petition is devoted to arguments as to why there supposedly is "cause" to excuse his defaulted claims. Such arguments are moot, however, because the governing standard requires a showing of both "cause" ***and*** "prejudice," and the Fourth Circuit also concluded that "Williams is...unable to demonstrate prejudice," i.e., "that, absent the alleged constitutional violation, the outcome of the case likely would have been different." See Williams, ___ F.3d at ___. (Ptn. App. 5).

With respect to Williams' claims involving Juror Stinnett, the Fourth Circuit made the following findings regarding the lack of "prejudice":

> Williams' claims with respect to juror Stinnett were marginal. It is hardly clear that Stinnett was related to Deputy Sheriff Meinhard given that the two divorced some fifteen years before Williams' trial. Furthermore, Meinhard's testimony was brief and did not speak to the critical facts of the trial. In fact, Williams' trial attorneys saw no need to cross-examine him. And the prosecutor explained his failure to notify the court of the relationship in an affidavit in which he stated that he simply did not remember being involved in Stinnett's divorce – a plausible claim given that the divorce occurred fifteen years prior to Williams' trial and was uncontested. Finally, it is anything but clear that a divorce from one of the Commonwealth's witnesses would predispose a juror toward the Commonwealth's case.

Williams, ___ F.3d at ___. (Ptn. App. 5).[9] And, with respect to petitioner's claim involving the alleged non-disclosure of Cruse's psychological report, the Court of Appeals referred back to its prior discussion of the significance of petitioner's highly inculpatory trial testimony, and concluded that there was no reasonable probability of a different result even if the report had been disclosed. (Id.).

This Court, therefore, certainly should not grant certiorari to review any "cause" issue that clearly would have no ultimate effect on the Fourth Circuit's decision to deny relief for lack of "prejudice." In any event, the Court of Appeals correctly concluded that there was no "cause" for petitioner's defaults:

The "Juror Stinnett" claims:

At the time of voir dire, Stinnett had been divorced from Deputy Sheriff Claude Meinhard for approximately 15 years. (JA 1425a). Given the length of time the two had been divorced, Stinnett understandably believed that Meinhard was neither "related" to her nor a member of her "immediate family." (JA 1425a-1425b). She never discussed the case with Meinhard and, in fact, since their divorce in 1979, they have spoken "only one or two times a year."[10] (JA 1425a). "The fact that [Meinhard] was a witness in the case made no difference to [Stinnett] one way or the other, and certainly didn't cause [her] to favor the Commonwealth or the defendant." (Id.). As the Fourth

[9] The claims involving Juror Stinnett never could result in the granting of federal collateral relief because her responses on voir dire cannot reasonably be deemed "dishonest" and because, in any event, full disclosure of the relevant facts would not have provided Williams with a valid challenge for cause. See McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 555-556 (1984).

[10] Williams asserts in conclusory fashion that the juror's affidavit regarding her limited contact with her ex-husband after the divorce "was not credible." (Ptn. 11). Williams, however, never has proffered any evidence from Meinhard or anyone else to contradict the juror's sworn statement.

Circuit found, see Williams, ___ F.3d at ___ (Ptn. App. 5), the record shows that Meinhard was a relatively insignificant witness at trial and that Williams' attorneys saw no need even to cross-examine him. (JA 78-85). Williams' assertion that Meinhard "was one of the officers who interviewed Cruse" (Ptn. 10) is misleading, because the record shows that when Meinhard was present the police "didn't learn much" from Cruse and that Meinhard was ***not*** present when Cruse later admitted his role in the murders to another officer. (JA 80-81, 84-85).

As to Stinnett's prior association with the prosecutor, the juror did not consider the prosecutor to have "represented" either her or Meinhard in their uncontested divorce. (JA 1425a). Although the prosecutor apparently had been the attorney who "drew up" the divorce papers, he had (and has) no recollection of having been involved in the divorce proceedings. (JA 1425c-1425d). Like Stinnett, moreover, although the prosecutor knew that Stinnett and Meinhard had been married in the distant past, he did not consider them to be "related" once they were divorced. (JA 1425c).

Based upon these record facts, the Fourth Circuit reached the following conclusions regarding Williams' undisputed failure to raise his "Juror Stinnett" claims in state court:

> ***The documents supporting Williams' Sixth Amendment claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well.*** Williams' [state habeas] request for investigative assistance was also deficient. He alluded vaguely to "irregularities, improprieties and omissions" with regard to jury selection and asked for an investigator to examine "all circumstances relating to the empanelment of the jury and the jury's consideration of the case." This request in no way alerted the state habeas court to any specific claim. [Citation omitted]. ***The failure to develop the Sixth Amendment claims was thus attributable to petitioner, not to the Supreme Court of Virginia's rejection of a fishing expedition request.***
>
> * * *
>
> To demonstrate cause, Williams must establish that "'some objective factor external to the defense impeded counsel's efforts.'"

> McCleskey v. Zant, 499 U.S. 467, 493 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). As noted, ***Williams' failure to develop the facts in state court was due to his own lack of diligence. Williams neither brought forth reasonably available facts, nor made reasonable efforts to convince the Supreme Court of Virginia that additional discovery was warranted.***

Williams, ___ F.3d at ___ (emphasis added). (Ptn. App. 4-5). There simply is no "compelling reason" to review the Fourth Circuit's fact-specific application of firmly-established law.

The "Brady" claim:

The district court correctly concluded that Williams' claim that the prosecution failed to disclose Cruse's psychological evaluation to the defense was barred by Williams' failure to raise the claim in state court. (JA 1302-1303). The Fourth Circuit concurred in this conclusion. See Williams, ___ F.3d at ___. (Ptn. App. 5). As "cause" for his default, Williams asserts that he made diligent efforts to develop his claim in state court and that the Virginia Supreme Court denied his discovery motion during the state habeas proceedings. (Ptn. 7-8, 33-34). The discovery motion to which Williams refers, however, had nothing to do with a psychiatric report concerning Cruse; it dealt solely with a request for an order requiring the Commonwealth to disclose Cruse's place of imprisonment.[11] (JA 398-399). Williams also complains that the state habeas court denied his request for an investigator. (Pet. Br. 38). That request, however, had nothing to do with access to Cruse's psychiatric report; it mentioned only in the broadest terms "issues relating to the testimony

[11] Williams murdered six persons within a short period of time and Cruse testified against him at great personal risk. Cruse is being incarcerated outside of Virginia and the Commonwealth, in order to protect Cruse, has declined to reveal his location without being ordered to do so by a court of competent jurisdiction. (JA 391, 401-403). Both the Virginia Supreme Court and the district court prudently declined Williams' request to issue such an order. (JA 398-399, 502, 1247, 1253, 1590). Williams' suggestion that the Commonwealth somehow prevented him from interviewing Cruse (Ptn. 27 n.13) is false. In 1997, a letter from Williams' investigator, Alfred C. Brown, was forwarded to Cruse and Cruse's decision not to respond to the letter was his choice, not the Commonwealth's. (JA 1602-1603).

and status...of Jeffrey Cruse." (JA 383).

Williams acknowledges, moreover, that his federal habeas counsel readily found the psychological report ***as a matter of public record in Cruse's case file in Cumberland County Circuit Court*** (JA 865-867), but he suggests that the report was not in the file when his state habeas counsel examined the file in 1995.[12] (Ptn. ___). He relies upon his state habeas counsel's affidavit which Williams submitted to the district court only ***after*** the court had dismissed the Brady claim as defaulted.[13] As the Fourth Circuit noted (Ptn. App. 5), however, the most state habeas counsel was willing to say was that, in April of 1998, he had "no recollection of seeing this report in Mr. Cruse's court file when [he] examined the file [in 1995]." (JA 1500). State habeas counsel's further assertion that he would have raised a Brady claim in state court "[i]f [he] had seen the report" (JA 1501) demonstrates at most that counsel did not "see" or notice the report when he examined Cruse's file in

[12] According to Williams, "[g]iven its sensitive nature, the report clearly had been improperly placed in a public file." (Ptn. 10). There is, however, no evidence in the record to support such speculation. Indeed, if the report supposedly was so sensitive or confidential, Williams' habeas attorney would not have been afforded the free access to Cruse's court file that he obviously was permitted. (JA 1500).

[13] Williams first raised the Brady claim based upon the psychiatric report when he filed his federal petition in November 1996. Prior to the district court's dismissal of the claim on April 13, 1998 (JA 1301-1303), Williams never had submitted an affidavit from state habeas counsel. The affidavit was submitted for the first time on April 27, 1998, in support of Williams' Rule 59(e) motion. (JA 1459-1460).

1995, ***not*** that the report was not then in the file just as it later was when found by federal habeas counsel.[14]

The district court correctly rejected Williams' complaints about the adequacy of the state habeas proceedings to develop his claim: "Williams has apparently been afforded the same type of assistance at both state and federal habeas – namely, court-appointed attorneys. The Court cannot discern any reason and has been offered no explanation why state habeas counsel failed to discover the report and present [the Brady claim] in state habeas proceedings." (JA 1303). The Fourth Circuit expressly agreed with this conclusion. See Williams, ___ F.3d at ___. (Ptn. App. 5). The mere fact that state habeas counsel failed to see, or discern the significance of, the report when he examined Cruse's public court file cannot serve as "cause" for Williams' failure to raise the claim in state court. See Coleman v. Thompson, 501 U.S. 722, 754-755 (1991) (alleged error by state habeas counsel cannot serve as "cause" for claim defaulted on state collateral review.").

Williams' suggestion that the prosecution's failure to disclose the report ***at trial*** somehow could constitute "cause" for the default of his Brady claim during the state collateral proceedings not only assumes without support that the prosecution had actual or constructive knowledge of

[14] Of course, in order to obtain federal collateral relief, Williams would have to show, not only that the report was unavailable when he filed his state habeas petition, but also that the report was not in Cruse's court file ***at the time of Williams' trial***. Williams never has offered any evidence that his trial attorneys were unaware of the report, or that they did not determine, as a matter of strategy, that on balance the report could have done more harm than good (JA 865: indicating Cruse told the evaluator that Williams had forced him to participate in the murders and that Cruse was extremely remorseful regarding his role) or that it would have been counter-productive to attempt to impeach Cruse on the basis of the report. Indeed, the record shows that Williams himself insisted upon testifying and relating to the jury his version of the events and that, despite his own drug and alcohol use prior to the murders, he was able to recall and relate those events in great detail. (JA 1156 at ¶ 13, 1161 at ¶ 27). Finally, the record evidence as a whole, including Williams' highly inculpatory testimony, demonstrates that the report was not "material" under United States v. Bagley, 473 U.S. 667, 674-675 (1985) (must show reasonable probability of different result).

the report, but also misperceives the concept of "cause." This Court never has suggested that the claim itself may supply "cause" for the default of the claim. See Gray v. Netherland, 518 U.S. 152, 162 (1996) (holding Brady claim defaulted by failure to raise it in state court). The reason the Court never has done so is obvious: such an ill-advised extension would eviscerate the default doctrine completely.[15]

Strickler inapposite

Williams' reliance upon Strickler v. Greene, 119 S.Ct. 1936 (1999), is misplaced. According to petitioner, this Court's conclusion that Strickler had demonstrated sufficient "cause" to excuse his failure to raise his "Brady" claim during his state habeas proceedings requires a similar conclusion here with respect to petitioner's defaulted claims. (Ptn. 32). Strickler, however, simply has nothing to do with Williams' case.[16]

This Court expressly declined to decide in Strickler whether any one of three factors, by itself, was sufficient to constitute "cause" because "the combination of all three surely suffices." See Strickler, 119 S.Ct. at 1952. Those factors were: "(a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's

[15] For example, Williams argues that his claims regarding Juror Stinnett's allegedly untruthful answers on voir dire should be excused because during voir dire "[t]he jurors answered under oath,...trial counsel had no reason to doubt her veracity....[and] if it was reasonable for trial counsel to rely on such representations made during trial, it was equally reasonable for state habeas counsel to rely on those same representations." (Ptn. 32).

[16] Williams' case was argued in the Fourth Circuit on June 7, 1999. Strickler was decided by this Court on June 17. At no time prior to the Fourth Circuit's decision in Williams' case on August 2 did his counsel bring this Court's decision in Strickler to the Court of Appeals' attention. Williams' counsel, Ms. Hartung, was also one of Strickler's attorneys.

reliance on the open file policy by asserting during state habeas proceedings that petitioner already received "everything known to the government." Id. The Court expressly noted, however, that it was the third factor, i.e., the Commonwealth's express representation to Strickler during the state habeas proceedings that rendered "[t]he Commonwealth's position on the 'cause' issue...particularly weak." Id. at 1951.

None of the factors specified in Strickler is present in petitioner's case. During the state habeas proceedings, the Commonwealth certainly made no representation to Williams regarding whether he had been provided all that he was entitled to at trial. The concept of a trial prosecutor's "open file policy," moreover, simply has nothing to do with Williams' claim regarding Cruse's psychological report, which was contained ***in Cruise's public court file***, not in the prosecutor's files or the police files maintained in Williams' case. And, finally, there is no evidence that the prosecution withheld the report from Williams or that the prosecution had any greater access to the report than he did.

III. THE FOURTH CIRCUIT'S REJECTION OF PETITIONER'S "UNDISCLOSED PLEA AGREEMENT" CLAIM UNDER PRE-AEDPA LAW DOES NOT WARRANT THIS COURT'S REVIEW.

Williams contends that, notwithstanding Jeffrey Cruse's trial testimony to the contrary, Cruse actually had an agreement with the prosecution whereby he would be spared a death sentence in return for his testimony against petitioner.[17] To the extent that Williams suggests

[17] This claim has three component parts, ***two of which clearly are defaulted***. One part of the claim is that the prosecution failed to provide the defense with a copy of Cruse's original, but later breached, written plea agreement. This was claim IV(A) in Williams' state habeas petition (JA 1076-1078) and the Virginia Supreme Court expressly applied Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974), to the claim because it clearly could have been raised at trial and on direct appeal. (JA 502). Another part of the claim is that the prosecution affirmatively misled the jury regarding whether there was an agreement with Cruse at the time he testified. This claim was ***never*** raised in state court and, therefore, is procedurally defaulted. See Gray v. Netherland, 518 U.S. at 162. Thus, the ***only*** aspect of Williams' claim that is not defaulted is the allegation that the prosecution

that this Court should grant certiorari on this claim in order to review the Fourth Circuit's interpretation of § 2254(e)(2) (Ptn. 34) or § 2254(d)(1) (Ptn. 14, n.8), the suggestion has no merit because the Court of Appeals' opinion clearly demonstrates that it rejected Williams' claim under pre-AEDPA law. Once again, this Court should not grant certiorari to review the Fourth Circuit's interpretation of particular provisions of AEDPA when, as here, it is clear that the prisoner's claim could not succeed even if AEDPA never had been enacted.

Facts:

It is undisputed that Cruse and the Commonwealth initially had a written agreement whereby Cruse would be spared the death penalty in exchange for his truthful cooperation and testimony against Williams. (JA 23). The Commonwealth, however, revoked the agreement prior to trial when it learned that Cruse had not told the truth regarding whether Mrs. Keller had been raped. Once it was learned that Mrs. Keller had been raped by both Cruse and Williams, the Commonwealth revoked the agreement, and Cruse testified at Williams' trial without the benefit of any agreement. See Williams v. Commonwealth, 450 S.E.2d at 370, 374. The record also shows that defense counsel knew about Cruse's breached plea agreement and cross-examined him regarding his sworn testimony that he was testifying for the prosecution without the benefit of such an agreement. (JA 165-171, 176-178, 1155).[18]

failed to reveal that, at the time he testified, Cruse allegedly had a secret agreement or understanding with the Commonwealth whereby he would be spared a death sentence. This was claim IV(C) in Williams' state habeas petition (JA 1080-1084) and the Virginia Supreme Court expressly found it had "no merit." (JA 502).

[18] Trial counsel's affidavit states that he "was aware prior to trial of the substance of [the] agreement." (JA 412). The prosecutor, moreover, stated in an affidavit that he was "confident" the defense had received a copy of the revoked agreement before trial. (JA 1398).

When Williams alleged in his state habeas petition that there was an undisclosed agreement between Cruse and the prosecution (JA 1080-1084), ***the Commonwealth responded with unequivocal, unrefuted affidavits from the trial prosecutor (who now is a Virginia judge) and from Cruse's trial attorney, both of whom swore under oath that the allegation was untrue and that Cruse testified truthfully at trial that he had no agreement and that he remained charged with capital murder and subject to the death penalty***. (JA 1398-1401).

Williams failed to develop ***any*** facts in support of his claim in state court. He submitted no counter-affidavits and, in fact, he presented the Virginia Supreme Court with a transcript of Cruse's guilty plea proceeding, which occurred more than two months ***after*** Cruse testified against Williams, showing that even then Cruse had no agreement with the Commonwealth and remained charged with capital murder and subject to the death penalty. (JA 437-438). The Virginia Supreme Court understandably rejected the claim on the basis of the unrefuted, overwhelming evidence.[19]

No merit:

It is beyond question that the Fourth Circuit did not apply § 2254(e)(2) to Williams' claim regarding Cruse's allegedly secret agreement. And, while the Court of Appeals recited its interpretation of § 2254(d)(1) before it addressed either of Williams' claims that the Virginia

[19] Williams asserts that he has "alleged numerous facts demonstrating that an undisclosed sentence agreement existed." (Ptn. 34). The "facts" to which he refers, however, are matters either contained in the trial record or otherwise available since the time of trial. (Ptn. App. 75-76). To the extent his claim is based upon such facts, it clearly is both defaulted and without merit. If the factual predicate for the claim is contained in the trial record, the claim is defaulted because Williams could have raised the claim at trial and on direct appeal. ***The claim also has no merit because matters spread upon the trial record, by definition, do not fall within the "Brady" rule***. Finally, to the extent Williams suggests that the state habeas court's denial of his discovery motion should excuse his failure to proffer any evidence in support of his claim, the suggestion must be rejected. On two separate occasions in the district court, two different federal judges independently concluded that Williams had failed to demonstrate the required "good cause" for discovery. (JA 1253, 1368-1372, 1574). If discovery was unwarranted in federal court, the state court certainly cannot be faulted for denying discovery.

Supreme Court had rejected on the merits, its actual analysis of Williams' claim regarding Cruse demonstrates that the Fourth Circuit rejected the claim under a pre-AEDPA, de novo standard of review:

> Williams...claims that the prosecution suppressed an alleged informal plea agreement that the Commonwealth had with Cruse in violation of Brady. ***The Supreme Court of Virginia was correct, however, to reject Williams' claim***. In state court the Commonwealth supplied two affidavits – one from Woodson and one from Cruse's trial counsel, Donald Blessing – stating unequivocally that Cruse had no agreement. Specifically, Woodson swore: "At the time Cruse testified against Williams in January of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty." Similarly, Blessing stated, "Cruse testified truthfully at...trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence."
>
> ***Moreover, before the district court, the Commonwealth introduced another affidavit from Blessing, in which he swore, "At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth."***[20] The district court thus properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's determination in a federal hearing in view of the unrefuted evidence. See Eaton v. Angelone,139 F.3d 990, 995 (4th Cir.) (refusing to transform "a federal habeas proceeding into a second trial."), cert. denied, 118 S.Ct. 2338 (1998); Spencer v. Murray, 18 F.3d 229 (4th Cir. 1994) (upholding denial of habeas corpus on basis of trial counsel's affidavit); Sawyers v. Collins, 986 F.2d 1493, 1504 (5th Cir. 1993) (en banc) (upholding denial of habeas corpus without evidentiary hearing even when state court made factual determination solely on basis of affidavits).
>
> ***Finally, even if Williams could demonstrate that Cruse had an***

[20] Williams' federal habeas counsel asked Cruse's trial counsel, Mr. Blessing, to sign an affidavit in support of the claim but Blessing refused to sign it. He later submitted another affidavit to the district court, unequivocally reaffirming not only that Cruse "had no agreement or understanding, formal or informal, with the Commonwealth," but also stating that he had refused to sign the affidavit proffered to him by petitioner's federal habeas counsel because paragraph 5 of the proposed affidavit was "not true." (JA 1402-1405).

> ***informal plea agreement, he could not show materiality***. See Kyles v Whitley, 514 U.S. 419 (1995) (demonstration of a Brady claim requires a showing of materiality). Given Williams' own testimony that he was least an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head, we are confident there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 433-434 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). As a result, ***we agree that Williams failed to demonstrate a Brady violation***.

Williams, ___ F.3d at ___ (emphasis added). (Ptn. App. 6). The Fourth Circuit's conclusion that the state court "was correct" and its statement that it "agreed" with the state court's conclusion that there was no Brady violation certainly connote de novo review.[21]

Williams never has adduced ***any*** evidence which, if presented at an evidentiary hearing and found to be true, would support the granting of federal collateral relief. Here, as in state court, the ***only*** evidence is that Cruse testified truthfully when he stated that he had no agreement with the prosecution at the time of trial. Federal habeas law never has entitled a petitioner to an evidentiary hearing under such circumstances. Moreover, the Fourth Circuit's fact-specific determination that Williams could not demonstrate the required "materiality" under Bagley, even if there were such an undisclosed agreement, renders moot Williams' contention that a hearing was necessary to determine whether such an agreement existed.

IV. THERE IS NO "COMPELLING REASON" TO REVIEW THE FOURTH CIRCUIT'S INTERPRETATION OF 21 U.S.C. § 848(q)(9).

Williams contends that this Court should stay his execution and grant certiorari to review

[21] The Fourth Circuit's citation to its prior decisions in Eaton and Spencer clearly demonstrates that it applied pre-AEDPA law pertaining to a petitioner's entitlement to a federal evidentiary hearing. Williams contends that the Fourth Circuit erred by stating that the district court "credited the state court's judgment." (Ptn. 14). But, of course, that is precisely what the district court did when, after it determined that Williams was not entitled to an evidentiary hearing, it rejected his claim on the basis of the existing record.

the Fourth Circuit's straightforward interpretation of the plain language of 21 U.S.C. § 848(q)(9): "No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality." (Ptn. 35-40). This contention should be rejected for several reasons.

Petitioner cites no decision of any other court of appeals that "conflicts" with the Fourth Circuit's interpretation of § 848(q)(9). Indeed, it appears that the Fourth Circuit's decision in Williams' case is the only court of appeals opinion which has interpreted the particular provision of the statute at issue here. Under these circumstances, this Court should not grant certiorari, if ever, until the particular issue has "percolated" for a sufficient time in the lower federal courts. See Arizona v. Evans, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting), citing McCray v. New York, 461 U.S. 961, 962-963 (1983) (Stevens, J., respecting denial of certiorari). In any event, this Court certainly should not grant a stay in a state prisoner's capital case to review what amounts to nothing more than a mere collateral issue within an already collateral case.

Facts:

On September 3, 1996, more than two months before he filed any federal habeas claims, Williams filed "ex parte and under seal" a request for the expert services of a neuropsychologist, a "mitigation specialist," an investigator[22] and a pathologist. (JA 524-544). On September 5, 1996, the district court granted the request in a sealed order which was not provided to respondent's counsel. (JA 545). Williams supplemented his ex parte motion the next day, requesting the

[22] Williams' assertion that he was denied the services of an investigator at public expense is belied by the letter dated July 29, 1997, from his investigator to Jeffrey Cruse on the letterhead of the Virginia Capital Representation Resource Center – ***a state funded agency*** – in which the investigator stated that he was "assigned to work on the Michael Williams case." (JA 1602-1603).

appointment of two hand-picked experts. (JA 546-547). In yet another ex parte sealed order, the district court granted Williams' requests on September 13, 1996. (JA 548).

The lower court entered the ex parte orders even though the Warden's counsel had written a letter to the court on August 16, 1996, advising of AEDPA's recent amendment of § 848(q)(9) which prohibited ex parte proceedings except upon a showing of a "need for confidentiality." (JA 523). When the Warden's counsel serendipitously learned of the district court's ex parte orders and raised the matter with the court, the court stayed its ex parte orders on September 18, 1996. (JA 549). Both parties then filed pleadings on the issue of whether the required showing of a "need for confidentiality" must be made at an adversarial proceeding. (JA 4). On October 7, 1996, the court agreed with the Warden that the required showing cannot be made at an ex parte proceeding.[23] (JA 550).

An adversarial proceeding was scheduled for October 23, 1996. At that hearing, however, Williams refused to go forward on the issue of "need for confidentiality," insisting that the statute permitted that such a showing could be made in an ex parte proceeding and that requiring him to go forward with the Warden's counsel present would force him to reveal confidential "strategy." (JA 558-561). Initially, the court indicated a willingness to consider an ex parte written statement by Williams of the claims he intended to raise and how they related to his requests for expert assistance. (JA 561, 577). The next day, however, Williams merely filed yet another "ex parte and under seal" pleading requesting leave to proceed ex parte on his request for expert assistance and with respect to

[23] As the district judge in Williams' case expressly asked: "How can I decide whether [the claims at which the request for expert assistance is directed] are procedurally blocked...without help from the Attorney General's Office?" (JA 561). Thus, the district court's earlier uninformed, ex parte conclusion that the services Williams had requested were reasonably necessary (Ptn. 38 n.16) cannot aid petitioner. It should not be surprising when a circumvention of the adversarial process results in an erroneous decision in favor of the party that improperly was afforded an ex parte proceeding.

showing a "need for confidentiality." (JA 579-596). On October 31, 1996, the district court issued an order stating that it would refrain from reviewing Williams' October 24 ex parte submission until the Fourth Circuit rendered a decision as to whether the Warden was entitled to access to what Williams had filed.[24] (JA 661).

Williams took no further action on his request for expert assistance before filing his habeas petition on November 20, 1996. (JA 6-7). On December 10, 1996, he filed another motion renewing his request for leave to proceed "ex parte and under seal" on his request for expert assistance. Even though Williams already had filed his habeas petition and delineated his claims, the December 10 motion made no attempt to relate his request for expert assistance to any particular claim raised in his petition. (JA 7; docket entry #50).

The record shows that Williams took no further action with respect to his request for expert assistance ***for the next 16 months*** before April 10, 1998, when the district court merely wrote the word "denied" on the sealed ex parte pleading Williams had filed on October 24, 1996. (JA 7-12, 1270-1271). At no time while the case was in the district court did Williams ever agree to pursue his request for expert assistance or the required "need for confidentiality" in an adversarial setting. To the contrary, Williams refused to litigate those issues in any proceeding in which the Warden's counsel was a participant.

No merit:

Prior to AEDPA, § 848(q)(9) authorized state prisoners under sentence of death to make ex parte requests for expert assistance in connection with their federal habeas proceedings. In 1996,

[24] Williams had filed an interlocutory appeal challenging the order dated October 7, 1996, in which the district court had directed that an adversarial hearing be held on the "need for confidentiality" issue. (JA 597). He subsequently appealed the district court's October 31 order as well. (JA 662). The Fourth Circuit dismissed the interlocutory appeals on November 19, 1996, for lack of jurisdiction. (JA 664).

however, as part of an overall reform of federal habeas proceedings, Congress added the following language to the statute: "No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality." The language employed by Congress could not be any clearer: there may be absolutely "no" ex parte communications with the court regarding a request for expert assistance "unless" the prisoner demonstrates a "need for confidentiality."

Williams contends that, despite Congress' unequivocal language, the statute nevertheless entitles him to litigate the "need for confidentiality" issue in an ex parte proceeding. In other words, even though Congress has mandated that a showing of a "need for confidentiality" is an absolute prerequisite to any ex parte contact with the court, he nevertheless is entitled to an ex parte contact with the court in order to determine whether the prerequisite exists. The Fourth Circuit correctly rejected Williams' argument as being, not only "convoluted," but contrary to "the plain language of the statute." See Williams, ___ F.3d at ___. (Ptn. App. 7-8).[25]

Finally, neither in any of his ex parte filings in the district court (JA 525, 593-595) nor in the Fourth Circuit did Williams make "a proper showing... concerning the need for confidentiality" ***in his case***. See § 848(q)(9). Generic allegations about a reluctance to reveal "strategy" or about the State's supposedly "superior resources" could be made in ***any*** capital habeas case.

[25] To the extent that Williams argues that it somehow would violate the Constitution if Congress intended what the Fourth Circuit says it intended (Ptn. 39-40), the argument is without merit. See generally Felker v. Turpin, 518 U.S. 651, 663-664 (1996) (Constitution not implicated by changes in § 2254 review of state court convictions). As the Fourth Circuit correctly concluded, even though a district court may not conduct an ex parte proceeding without first conducting an adversarial proceeding to determine if an ex parte proceeding is warranted, "[w]hat information is disclosed at that [adversarial] hearing would of course remain within the discretion of the district court." See Williams, ___ F.3d at ___ n.2. (Ptn. App. 8 n.2).

CONCLUSION

The petition for a writ of certiorari and the application for a stay of execution should be denied.

Respectfully submitted,

JOHN B. TAYLOR, WARDEN

By: _____
Counsel

Donald R. Curry
Senior Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4856

RESPONDENT'S APPENDIX

breakdown of the PGM type. And then lastly, PepA stands for peptidase A. Again, we use the abbreviation, and it is another system in which I can type blood and body fluid samples in.

Now, these systems are inherited independently, and what I mean by that is that just because you are a particular type in one system does not predetermine what type you are in another system. So we use these systems to help describe or create a profile of the particular sample. For instance, if you were talking about a car, you might say it's a green car, it's a four-door, it's a Chevrolet. Well, with my particular typing system, I say that the particular sample is a PGM type whatever, subtype whatever, PepA type whatever, and those are descriptions as to what the sample is.

Q Did you have occasion to capture these systems from Morris Keller?

A Yes. On the known blood sample that was submitted to me from Morris Keller, the types I identified were PGM type 2-1, PGM subtype -- Remember, I said subtype is just a breakdown of the PGM system -- the subtype being a 2+1+, and the PepA type 1. Now, the numbers are what we use to describe what the type is. Where the A-B-O system used letters, these systems use numbers and plus and minus signs.

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Q Did you have occasion to do the same from the blood of Mary Elizabeth Keller?

A Yes. I also received a blood sample from Mary Keller and determined that the types were PGM type 2-1, subtype 2+1+, PepA type 1. Now, in looking at these two individuals, Mr. Keller and Mrs. Keller, you can see across that they do have the same types in the systems that I typed across.

Q And who did you type next, please?

A The next sample I have listed, I got a blood sample from Mr. Cruse, and the types, you can see, are PGM type 2-1, subtype 2+1-, PepA type 1. And you can see by looking across there that there is a difference in types in this PGM subtyping system. Mr. Cruse is a 2+1-, whereas both of the Kellers are 2+1+, and, therefore, I can distinguish Mr. Cruse from Mr. and Mrs. Keller.

Q Did you have occasion to type the defendant in this case, Michael Williams?

A Yes. I received a blood sample from Mr. Williams. The types you see are the PGM type 2-1, subtype 2-1+, PepA type 1. Now, in looking at all the four individuals involved, they all have the same PGM type, they all have the same PepA type, but this PGM subtyping system I can use to distinguish between the individuals in the case.

RESP. APP. 2

Q In this case, Michael Williams has a different PGM subtype than any of the other three?

A That is correct.

Q Did you have occasion to analyze the vaginal swabs taken by the medical examiner from the vaginal vault of Mary Elizabeth Keller?

A Yes. I examined the vaginal swabs and the vaginal smear from Mrs. Keller, and on those I identified spermatozoa, which is the male reproductive cell.

Q Did you have occasion to type the fluids that you found on those vaginal swabs?

A Yes. Because I did identify spermatozoa, that also means that there was seminal fluid present, because seminal fluid is made up of a fluid portion and a sperm portion. And in these systems that I test for, to get very technical, I am testing that fluid portion on the vaginal swabs. Now, the vaginal swabs, being that they were taken from the vaginal area, I can expect for there to be vaginal fluid from Mrs. Keller there, just because of where those swabs were taken from. I also identified spermatozoa, which means that those swabs are a mixture of vaginal fluid and seminal fluid. And you can see that the types I determined were PGM type 2-1, subtype 2+2-1+, and PepA type 1. Now, this 2+2-1+ is the mixture. And when I compare these types back to the known individuals in the

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case, the first thing I do is I look for something, I look for a type foreign to Mrs. Keller, because, remember, we said that there is vaginal fluid there. So in comparing this back to Mrs. Keller, the 2- is foreign. Mrs. Keller is a 2+1+. She is not capable of producing a 2-. So in looking at the individuals, from whom I have blood samples for, this 2-could have come from Mr. Williams. This 2-could not have come from Mr. Cruse. It could not have come from Mr. Keller. Therefore, my conclusion would be that if there was one donor of the seminal fluid, what I refer to in my report as a sole donor of the seminal fluid, Mr. Williams cannot be eliminated. However, if there were more than one donor of that seminal fluid, we've already said Mr. Williams cannot eliminated, but if there was more than one donor, Mr. Cruse and Mr. Keller could not be eliminated.

Q Between those four people, the only one up there that has a 2- is who?

A Mr. Williams.

Q The vaginal swabs captured 2-. Between those four people, the only one up there who could have deposited that 2- in the vaginal vault of Mary Elizabeth Keller would have been who?

A Mr. Williams.

Q Let me ask you, Ms. Schiermeier, what you

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THE UNITED STATES DISTRIC. COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner, Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center,

Respondent.

PETITIONER MICHAEL WAYNE WILLIAMS'
OPPOSITION TO RESPONDENT'S MOTION TO DISMISS
HIS INITIAL PETITION FOR A WRIT OF HABEAS CORPUS

Respondent has moved to dismiss Michael Williams petition for a writ of habeas corpus pursuant to Rule 5 of the Rules Governing Section 2254 Cases. For the reasons set forth herein and in Williams' prior pleadings, the motion should be denied.

EXHAUSTION

Under Virginia law effective July 1, 1995, death sentenced state prisoners are permitted only one state habeas petition. and it must be filed no later than 60 days after denial of certiorari on direct appeal. This restriction applies only to death row inmates. Va. Code § 8.01-654.1. Under prior state law, successive petitions were almost always prohibited. Va. Code § 8.01-654(B)(2). Thus, as Respondent has stated, no state court avenue for review remains open to Williams. All his claims are "exhausted" for purposes of federal habeas review under 28 U.S.C. § 2254(b).

THE NEW HABEAS CORPUS STATUTE DOES NOT
APPLY TO THIS PETITION

Respondent asserts without argument or analysis that the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act"), signed into law on April 24, 1996, controls

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8. Williams' Constitutional Right To Be Present At Trial and To Confront His Witnesses Should Not Have Been The Subject Of Impeachment.

Respondent concedes that this claim is preserved, but argues that this Court would violate the "new rule" doctrine if relief is granted. Respondent's position is unfounded.

There is no need to establish a new rule in order to grant Williams relief on this claim. Existing constitutional principles established by the United States Supreme Court apply. In denying Williams relief, the Virginia Supreme Court wholly failed to apply these principles. This Court is not, therefore, required under 28 U.S.C. § 2254(d)(1) to defer to the Virginia Supreme Court's dismissal of this claim.

The Supreme Court long ago established the principle that the Constitution forbids prosecutorial comment upon a criminal defendant's exercise of his Fifth Amendment right not to testify. Griffin v. California, 380 U.S. 609 (1965). The defendant's Sixth Amendment right to confront witnesses against him serves an important function essential to a fair trial, namely, prevention of perjury by prosecution witnesses. Maryland v. Craig, 497 U.S. 836, 846 (1990); Coy v. Iowa, 487 U.S. 1012, 1019 (1988). The Sixth Amendment right confront prosecution witnesses is as essential to a fair trial as the Fifth Amendment right against self-incrimination. Coy v. Iowa, supra. Implicit in these Supreme Court decisions is principle that the Sixth Amendment forbids prosecutorial impeachment of a criminal defendant's testimony through cross-examination designed to show that the defendant exercised his right to be present at trial and confront his accusers. Griffin; Coy; Craig.

On direct appeal, the Virginia Supreme Court dismissed Williams' Sixth Amendment claim without addressing the principles established in Griffin, Coy, or Craig, stating only that the prosecutor's cross-examination of Williams regarding his presence during the testimony of other witnesses merely "reflected what the jury already knew." 248 Va. at 544, 450 S.E.2d at 375. This same rationale was expressly rejected by the United States Supreme Court in Griffin, where the State argued that prosecutorial comment upon the

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No. 99-6615

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison,
Waverly, Virginia,

Respondent.

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Imminent Execution Date:
Thursday, October 28, 1999

Barbara L. Hartung
(Counsel of Record)
Suite 504
1001 East Main Street
Richmond, VA 23219
(804) 649-1088

James E. Moore
Christian & Barton, L.L.P.
Suite 1200
909 East Main Street
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

As the petition demonstrated, this case raises three important issuing warranting review by this Court: (1) whether a prosecutor may impeach a testifying defendant based on his mere presence throughout the trial and, if so, whether this is a new rule under Teague v. Lane, 489 U.S. 288 (1989); (2) whether 28 U.S.C. 2254(e)(2), which prohibits a federal habeas court from holding an evidentiary hearing only "if the applicant has failed to develop the factual basis of claim in State Court proceedings," governs a petitioner's claims where the state suppressed the relevant facts, denied discovery, denied all resources to discover and develop claims, and denied an evidentiary hearing; and (iii) whether 21 U.S.C. sec. 848(q)(9) requires a petitioner, who moves to proceed ex parte for expert assistance, to demonstrate his need for confidentiality at an adversarial hearing. Respondent's brief in opposition offers no valid reason why this Court should deny review.

I.

At trial, the prosecutor urged the jury to infer from petitioner's exercise of his Sixth Amendment right to confront the witnesses against him that petitioner's testimony was fabricated and not credible. As petitioner explained (Pet. 15-22), the Virginia Supreme Court's decision upholding the prosecutor's conduct conflicts with the Second Circuit's decision in Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997), aff'd on rehearing, 159 F.3d 98 (2d Cir. 1998), cert. granted, 119 S. Ct. 1248 (1999). The decision below is flatly inconsistent with this Court's opinions in Griffin v. California, 380 U.S. 609 (1965), and Brooks v.

Tennessee, 406 U.S. 605 (1972). Furthermore, as this issue affects every case in which a criminal defendant considers testifying, it is of indisputable importance.

Respondent's brief is noteworthy for what it does not and cannot say. Respondent does not deny that this issue is important and recurring. Nor does he dispute that the state court decision conflicts with Agard, Griffin, and Brooks. Indeed, Respondent fails to make any serious attempt to defend the decision on its merits. While implicitly conceding error, he maintains petitioner must be denied relief on other grounds.

First, respondent attempts to distinguish petitioner's claim from that presented in Agard on the grounds that the improper comments in petitioner's case occurred during cross-examination while in Agard they occurred during summation. This is a distinction without a difference. The prosecutor's initial twelve questions during petitioner's cross examination were divorced from the substance of any prior testimony. They were directed solely at petitioner's presence throughout the trial and solely at petitioner's unique opportunity to hear all the prior testimony before testifying. Thus, petitioner was impeached with his right to confront the witnesses against him and to be present throughout his trial. Just as a prosecutor cannot argue to a jury that a defendant is not credible because he had the assistance of counsel, a prosecutor cannot cross examine a defendant with the fact that he had an attorney and did not proceed pro se. Impeachment with the mere exercise of a constitutional right diminishes that right,

makes its exercise costly, and is constitutionally prohibited. The state court's decision was simply wrong and is owed no deference under 28 U.S.C. sec. 2254(d)(1) or Green v. French, 143 F.3d 865 (4th Cir. 1998).

Second, respondent argues that although no "new rule" issue was raised by the petitioner in Agard either in its petition for certiorari or its merits brief (Opp. at 7-8), this Court's grant of certiorari somehow demonstrates that the issue presents a new rule under Teague v. Lane, 489 U.S. 288 (1989). Thus, respondent reasons, the Fourth Circuit correctly dismissed the claim as barred under the new rule doctrine.

As has been demonstrated repeatedly, a grant of certiorari review does not indicate this Court's ultimate decision on an issue. And a grant of certiorari does not demonstrate that this Court's decision will announce a new rule. See, e.g., Kyles v. Whitley, 514 U.S. 419 (1995). Moreover, this Court may elect to address the substantive constitutional issue first and the new rule issue second in separate decisions. See, e.g., Simmons v. South Carolina, 512 U.S. 154 (1994), and O'Dell v. Netherland, 117 S. Ct. 1969 (1997)(holding that rule announced in Simmons was new under Teague). Thus, petitioner's case presents this Court with an timely opportunity to address the Teague issue not raised in Agard. This is a compelling reason to grant certiorari review or, at a minimum, to issue a stay pending the decision in Agard.

Third, respondent argues that any impeachment error was harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993).

Petitioner demonstrated in his brief that the Fourth Circuit's harmless error analysis was flawed as it focused only on petitioner's inculpatory testimony. (Pet. 21-23) This was error. The prosecutor's improper impeachment was harmful because it directly affected the jury's evaluation of petitioner's credibility. Contrary to respondent's shrill insistence that petitioner could not avoid a capital conviction given his testimony, the evidence demonstrated otherwise[1]. In light of this evidence, the court charged the jury on both capital murder and the lesser offense of first degree murder[2]. JA 287-288. As the prosecutor repeatedly emphasized on summation, the only issue for the jury to decide was the relative credibility of petitioner and Cruse. JA 295-96, 304, 317-19. If any one juror had a reasonable doubt, petitioner could not be convicted of capital murder. The prosecutor's improper cross examination was harmful as credibility was the only issue for the jury. The Fourth Circuit's analysis was flawed.

The issue is important, recurring and merits review.

II.

A. As respondent concedes, petitioner was represented by an "experienced" attorney in state habeas. (Opp. 5). The district

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[1] The medical examiner stated that one bullet entered and exited Mr. Keller's jaw. It was not necessarily a lethal wound. JA 198-199, 205. If this wound was inflicted first, Mr. Keller would have been able to move around (as he did when he stood up). JA 199.

[2] "If you find from the evidence that. . . Cruse alone killed [Mr. and Mrs.] Keller, then you shall find the defendant guilty of first degree murder [.]" JA 286-287.

court found that state habeas counsel made "numerous attempts to obtain the evidence required to discover, present, and prove [petitioner's] claims" but was denied "discovery, expert assistance, and investigative funds and . . . [a] hearing to take evidence outside of the trial record." A 16. When petitioner reached federal habeas, he discovered new claims using resources denied in state court. The district court initially granted petitioner an evidentiary hearing on three claims of juror and prosecutorial misconduct but was forced to revoke that order when the Fourth Circuit directed the court to apply 28 U.S.C. sec. 2254(e)(2) prohibiting an evidentiary hearing in most cases. The Fourth Circuit affirmed the denial of a hearing on appeal.

The correct interpretation and application of sec. 2254(e)(2) is of utmost importance to the federal courts. Respondent does not disagree and does not even discuss the statute. The Fourth Circuit's interpretation of 2254(e)(2) eliminates federal habeas hearings in the vast majority of cases where a petitioner can demonstrate cause and prejudice under this Court's prior precedents. The issue is critical in the Fourth Circuit, which includes the death penalty states of Virginia, North Carolina, South Carolina, and Maryland. It has heightened importance in Virginia. Since obtaining original jurisdiction of capital habeas petitions in 1995, the Virginia Supreme Court has <u>never</u> granted discovery, expert and investigative resources, or an evidentiary hearing to any capital habeas petitioner. The Commonwealth has systematically and routinely denied capital petitioners the means

to discover and develop constitutional claims while in state court. The Commonwealth now seeks to insulate its proceedings from federal review by the misapplication of sec. 2254(e)(2).

The Fourth Circuit's interpretation of 2254(e)(2) conflicts with that of its sister circuits because it ignores the conditions precedent for application of the statute ("if the applicant has failed to develop . . ."). All other circuits have held that the failure must be due to the petitioner's decision or omission before 2254(e)(2) applies. The Fourth Circuit applied 2254(e)(2) to all claims never raised in state court irrespective of the reasons. With this decision, the Fourth Circuit nullifies this Court's long standing and well developed doctrine of cause and prejudice to overcome procedural default in state court. In its place, the Fourth Circuit has substituted the miscarriage of justice standard set forth in Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), and Sawyer v. Whitley, 505 U.S. 333, 346-47 (1992) ("clear and convincing evidence" of actual innocence). As a result, if the state successfully conceals indisputable misconduct by the police, the prosecutor, and/or the jurors, until a petitioner enters federal proceedings, that petitioner must demonstrate his actual innocence before a federal evidentiary hearing can be held. This radical departure from established law merits this Court's review.

B. Respondent devotes most of his brief to arguing that petitioner cannot demonstrate cause and prejudice under pre-AEDPA law. Hence, this Court should deny review of the 2254(e)(2) issue. He is mistaken. When meeting the cause and prejudice standard,

petitioner also demonstrates that sec. 2254(e)(2) in inapplicable.

Petitioner raised two Sixth Amendment claims based on misconduct during voir dire. Petitioner demonstrated that the jury forewoman failed to reveal that she was the ex-wife of a prosecution witness, who happened to be the deputy sheriff, and failed to reveal that one of the prosecutors had been her divorce attorney[3]. Petitioner demonstrated that the prosecutor knew of this relationship and, in violation of his duty, failed to disclose it. See United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993).

In state habeas, petitioner moved for a jury investigator to investigate misconduct claims. JA 386. The Warden successfully opposed that motion as without merit ("frivolous") and argued that the "[state] Court certainly should not authorize the expenditure of taxpayer funds for an investigator to intrude upon the private lives of the jurors." JA 395. The district court found cause. JA 1300. See Dobbs v. Zant, 506 U.S. 357 (1993) (cause shown based on state's erroneous representations); McCleskey v. Zant, 499 U.S. 467, 497 (1991) ("external impediment, whether it be government interference or the reasonable unavailability of the factual basis

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[3] Respondent's argument that there was no "relationship" is refuted by the facts. The juror and the witness had four children and resided in the same small community. At the time of their divorce, the juror was granted custody and the witness visitation rights (and likely had support obligations as well). The children were then 7, 13, 15, and 16 years old. The juror and witness certainly had continued contact for several more years if only to deal with matters of education, medical care and health, holidays, vacations, travel plans, and the general welfare of their children. For these same reasons, the prosecutor's role in the divorce required resolution of complex issues dealing with custody, support, visitation, and property division. An evidentiary hearing would establish the facts and demonstrate an ongoing relationship.

for the claim is cause excusing procedural default); Amadeo v. Zant, 486 U.S. 214, 222 (1988) (cause present where evidence of violation was concealed by county officials and not reasonably available to petitioner's lawyers)(emphasis added).

The Fourth Circuit erred when it ignored this Court's established law on cause for procedural default and the most recent decision in Strickler v. Greene, 119 S. Ct. 1936 (1999)[4]. The juror claims were not "reasonably available," and there was state interference. Contrary to the Fourth Circuit's opinion, state habeas counsel was not required to review all public records on every juror and every juror's family members (or review the prosecutor's past and current client files) to satisfy some extraordinary diligence requirement where there was no hint that misconduct by both the juror and the prosecutor had occurred.

Petitioner was prejudiced by the seating of the juror, who became the jury forewoman[5]. The presence of a biased juror is not subject to harmless error analysis but constitutes a structural defect in the trial. See generally Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991). The Fourth Circuit erred when it found no prejudice based on the content and length of the testimony by the

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[4] Contrary to Respondent's suggestion, the Fourth Circuit was well aware of the Strickler decision when deciding petitioner's case as one judge was a member of both panels. One may reasonably assume that the judges read this Court's decisions. In addition, petitioner argued in his petition for rehearing that the court had failed to follow Strickler.

[5] See cases cited in Petition For Writ of Certiorari at 30 and n. 14; in Petitioner's Brief On Appeal at 21-25; and in Petitioner's Reply Brief On Appeal at 7-8.

juror's ex-husband. The Fourth Circuit failed to cite any supporting authority and failed to discuss any of the numerous decisions mandating relief in similar cases. The decision has no support in the caselaw[6]. Petitioner was entitled to a hearing.

C. Petitioner raised a Brady claim based on the state's failure to disclose a psychiatric report in which Cruse admitted before trial that he had little recollection of the Keller murders. Respondent cannot dispute that the trial attorneys moved for production of all Brady material. JA 33. He cannot dispute that state habeas counsel filed an extensive Brady request and specifically asked for disclosure of all psychiatric reports that could affect a witness' credibility. JA 379. He cannot dispute that Respondent, represented by the very same counsel as in this proceeding, erroneously stated that there is no obligation in habeas proceedings to produce exculpatory evidence[7] and "we have no intention of doing so." JA 381. State habeas counsel then moved for discovery of "all documentation relating [to] the incarceration of Mr. Cruse from the date of his first incarceration . . . on capital murder charges[.]" JA 398. This was denied along

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[6] Respondent also errs when asserting the juror would not have been removed if she answered honestly. Dismissal for cause is entrusted to the discretion of the trial court. Stockton v. Commonwealth, 402 S.E.2d 196, 200 (Va. 1991). The trial court removed two jurors for less substantial reasons: one based on employment as a corrections officer seven years earlier and the second because he was a first cousin of the prosecutor.

[7] The Warden's position conflicts with: Mooney v. Holohan, 294 U.S. 103 (1935), Imbler v. Pachtman, 424 U.S. 409, 427 n. 25 (1976), Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992).

with a motion to interview Cruse[8]. The state never produced the report. As respondent conceded, petitioner was represented by an "experienced" criminal defense attorney in state habeas. That attorney searched the available, known files on Cruse and did not find the report therein. He submitted an affidavit so stating to the district court. As an experienced defense attorney, he would have recognized the exculpatory nature of the report immediately. These facts soundly refute Respondent's suggestion that counsel saw the report but failed to appreciate its significance[9].

State habeas counsel's affidavit is unrefuted. Respondent obtained three lengthy affidavits from petitioner's trial attorneys in support of motions to dismiss in both state and federal court (JA 411-418, 476-488). However, Respondent has never obtained an affidavit from those attorneys verifying Respondent's suggestion (Opp. 17 n.14) that Cruse's psychiatric report was provided to them before trial, and they elected not to use it. Nor has Respondent submitted any affidavit from the two prosecutors stating that they provided the Cruse report to petitioner's trial attorneys as

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[8] The Commonwealth has also denied requests by state habeas counsel and federal habeas counsel to interview Cruse at any secure location selected by the Commonwealth. The Respondent's purported safety concerns are bogus. This case does not involve organized gangs where reprisals might be carried out by members at another institution. Counsel need not be told where Cruse is incarcerated permanently in order to conduct an interview. The Commonwealth's assertion (Opp. 15 at n.11) that Cruse declined to respond to a letter sent on Williams' behalf is unsupported by the record. All that is known is that the Commonwealth seized a letter sent to Cruse.

[9] Equally specious is Respondent's suggestion (Opp. 16 n. 12) that court documents are never misfiled, and the report was in the file all along.

required by Brady.

Petitioner has demonstrated cause to overcome procedural default and has shown why sec. 2254(e)(2) is inapplicable. The Fourth Circuit erred when it found counsel was not diligent. The state purported to fulfill its Brady obligations at the time of trial. The state then refused to provide any unproduced Brady material during state habeas and opposed all of petitioner's discovery and investigative efforts. As a result, the state suppressed the Cruse psychiatric report throughout state court proceedings. The Commonwealth has a notably undistinguished record for observance of Brady's requirements. See Strickler, supra (failure to provide witness' statements impeaching her trial testimony).

Petitioner has established prejudice as the district court found. JA 54. The only issue for the jury was the relative credibility of petitioner and Cruse. Had the jurors known that Cruse had little recollection of that evening, a first degree verdict would have been a reasonable probability. The trial court had instructed the jurors that they must convict petitioner of the lesser noncapital, offense of first degree murder if they had a reasonable doubt about the degree of the offense. JA 288. If Cruse had been impeached with the report, petitioner's testimony would have been unnecessary.

The denial of a federal evidentiary hearing was error.

D. Cruse testified against petitioner, later pled guilty to the capital murder of Mrs. Keller, and received a life sentence.

Petitioner alleged that Cruse had an undisclosed understanding about his sentence when he testified against petitioner. Petitioner raised this claim in state habeas but was denied discovery and a hearing. The federal district court granted a hearing. The Fourth Circuit erroneously directed the district court to apply sec. 2254(e)(2) to this claim. Protesting that this was error, the district court reluctantly cancelled the hearing and dismissed the claim. On appeal, the Fourth Circuit refused to admit its error or correct it. Instead the Fourth Circuit affirmed the dismissal of the Brady claim under sec. 2254(d)(1), a provision that applies only when a petitioner has had a full and fair opportunity in state court to present and develop a claim.

Respondent now tries to distance himself from both erroneous decisions of the Fourth Circuit by arguing that the Fourth Circuit acted under pre-AEDPA law. There is no merit to this argument.

Petitioner set forth sufficient facts for a hearing. In the Commonwealth's final argument to the jury, the lead prosecutor argued:

> [Cruse] sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. And like he told you right now his back is against the wall; if he lies, he dies . . .

JA 319 (emphasis added). Respondent has never explained this remark. Respondent has never submitted an affidavit from the lead prosecutor, who made the argument, swearing under oath that there was no deal, no understanding, no arrangement with Cruse in exchange for his testimony against petitioner. Respondent has never submitted a sworn affidavit from Cruse. There is only one

logical inference from the prosecutor's argument: there was a direct relationship between Cruse's testimony and his sentence. That agreement may have been known only to the lead prosecutor and Cruse[10]. They have never submitted affidavits in any court.

Additional facts supported petitioner's claim that Cruse had an undisclosed agreement. The state never set a date for Cruse's capital trial. After his testimony, the charges against Cruse were reduced, and he was permitted to plead to one capital murder count. The state made a strong plea on Cruse's behalf for a life sentence based on his cooperation against petitioner. The Commonwealth has continued to hide Cruse throughout state and federal habeas proceedings. These facts support petitioner's Brady claim.

Respondent argues that petitioner failed to discover any facts to support his claim in state court. Of course, Respondent opposed all petitioner's discovery requests, motions for investigative assistance, motions to interview Cruse, and motion for an evidentiary hearing. In federal court, Respondent argued that 2254(e)(2) barred a hearing and all discovery. This was error as even the Fourth Circuit belatedly recognized. Having succeeded in blocking petitioner's discovery of the facts, Respondent cannot argue that petitioner is responsible for the undeveloped state (or federal) record. See Correll v. Stewart, 137 F. 3d 1404, 1414 (9th Cir. 1998). Under Townsend v. Sain, 372 U.S. 293, 313 (1963), a

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[10] Thus, affidavits from one prosecutor (the same prosecutor who failed to reveal the facts concerning juror Stinnett) and one defense attorney do not settle the issue. Moreover, that attorney, in a conversation with federal habeas counsel, indicated there was an understanding. JA 1405 at ¶5. He later denied this. JA 1402.

hearing is mandatory where the failure to develop the state record is attributable to the state. The Fourth Circuit erred under both pre-AEDPA law and the AEDPA.

Nor is the sentence agreement claim defaulted as Respondent suggests. The Commonwealth has denied throughout the trial, state habeas, and federal habeas proceedings that Cruse had a sentencing deal. Respondent continues to deny a deal existed. Hence, the undisputed facts pointing to a deal must have some other explanation -- an explanation Respondent has yet to offer. The default argument is fallacious.

Finally, petitioner demonstrated prejudice where credibility was the sole issue for the jury. The forensic evidence could not settle the issue. As set forth above in the discussion of the state's suppression of Cruse's psychiatric report, the jury was instructed on the lesser offense of first degree murder. Doubt about the degree of homicide had to be resolved in petitioner's favor. Had the jurors known that Cruse would gain a substantial benefit -- his life -- from his testimony, reasonable doubt and the reasonable probability of a different verdict would have resulted.

The Fourth Circuit applied sec. 2554(d)(1) to petitioner's claim ("an overall obligation of deference to the state court system . . . obtains . . . and must be upheld. . .")(A 6). This was error as was the its prior Order directing the district court to apply sec. 2254(e)(2).

The correct application and interpretation of sec. 2254(e)(2) merits review given its central importance to the new AEDPA.

III.

The correct interpretation and application of 21 U.S.C. sec. 848(q)(9) affects every capital defendant and habeas petitioner. The Fourth Circuit sua sponte has amended the statute to require an adversarial hearing on the need for confidentiality when a petitioner seeks to obtain services ex parte. Addressing the application of 848(q)(9), some district courts have required (i) a generic motion for services stating a need for confidentiality filed on the state along with (ii) an ex parte, sealed motion for specific services filed only with the court. See Patrick v. Johnson, 37 F. Supp.2d 815, 816 (N.D. Tex. 1999)(citing cases). Others have held that the state cannot be a party to these applications. See cases cited in Pet. at 39, n.17. No court, other than the Fourth Circuit, has held that a petitioner must demonstrate the necessity of confidentiality before opposing counsel. This is a radical position and contrary to the plain language of the statute itself. It merits this Court's review.

Petitioner has demonstrated that the state used its resources to impede the discovery and development of his constitutional claims in every forum, even going so far as to hide the principal witness. His fears of state interference were well-founded. Thus, petitioner insisted on an ex parte proceeding to demonstrate confidentiality and refused to waive that provision in the statute.

CONCLUSION

The petition for writ of certiorari and stay should be granted.

Respectfully submitted,
Barbara L. Hartung*
James E. Moore

*Counsel of Record

SUPPLEMENT TO PETITIONER'S APPENDIX

Q Can you describe the track that Gunshot Number Three took?

A That bullet went right to left and went through the facial bones.

Q If you could, using your own head, can you describe the entrance and exit of this particular gunshot wound?

A Well, the entrance is about here, the exit on the other side about here.

Q Did that pass through the brain?

A It did not.

Q What would you say about the lethal effect of that wound not entering the brain?

A Sometimes bullets can pass through the face and cause enough injury to the base of the skull and the brain to be fatal, so it's possible that it was. Since we had other wounds, you really cannot evaluate what individual damage that bullet would have done to the skull or the brain.

Q If it was the first wound inflicted and the only one inflicted, would you call it a potentially lethal wound in and of itself or not?

A Well, if it's the only wound inflicted, you would just have to judge that by the outcome.

Q Would it be fair to say that it contributed

to the death of Morris Keller in this case?

A Yes.

Q Again, was there an exit wound associated with Gunshot Wound Number Three?

A Yes, there was an exit wound.

Q If this was the first gunshot wound inflicted to the deceased, would it be possible for him to exercise, even after the infliction of this wound, some movement prior to the other wounds being inflicted?

A That might be possible.

Q I believe the next wound would be Gunshot Wound Number Four; is that correct?

A Yes.

Q Can you give the ladies and gentlemen of the Jury the location of that wound, please?

A There's a wound on the thigh, right thigh.

Q Was this a through and through entrance/ exit?

A Yes, it was.

Q Let me ask you this. In determining entrance and exit as to that gunshot wound, did you use the aid of the residue powders on the clothes?

A At the time the autopsy was performed, no.

Q Subsequently?

A Subsequently, we did have the knowledge of

you didn't say, was Shot Number Three a lethal wound?

A Yes, most certainly. All of those wounds could have caused death.

Q In and of themselves?

A In and of themselves, each individually.

Q Now, calling your attention to Mr. Keller's wounds --

A Okay.

Q -- and Mr. Von Schuch asked you with particularity to Shot Number Three, which passed through the face, basically?

A Yes.

Q And you indicated to him that that was a contributing factor to the death; is that right?

A It's contributing and on occasion in and of itself that type of wound can be lethal, but you cannot evaluate that because you have two other wounds that actually went into the head.

Q Okay. So my question to you, the first two, Shot Number One and Shot Number Two, were most definitely lethal wounds; is that correct?

A They are certainly potentially lethal, yes.

Q And Shot Number Three may have been lethal, but you cannot tell, in and of itself?

A That's correct.

shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that Jeffrey Alan Cruse was the person who killed Mary Elizabeth Keller then you shall find the defendant guilty of first degree murder and fix his punishment at:

(1) Imprisonment for life; or

(2) A term of imprisonment of not less than twenty (20) years.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed Morris C. Keller, Jr.; and

(2) That the killing was willful, deliberate and premeditated; and

(3) That the killing of Morris C. Keller, Jr. occurred during the commission of robbery while the defendant was armed with a deadly

weapon;

AND/OR

(4) That the killing of Morris C Keller, Jr. occurred during the commission of, or subsequent to, the rape of Mary Elizabeth Keller;

AND/OR

(5) That the killing of Morris C. Keller, Jr. occurred as part of the same act or transaction in which the defendant also killed Mary Elizabeth Keller.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that Jeffrey Alan Cruse alone killed Morris C. Keller, Jr. then you shall find the defendant guilty of first degree murder and fix his punishment at:

(1) Imprisonment for life; or

(2) A term of imprisonment of not less than twenty (20) years.

If you find the Commonwealth has failed to prove

any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

Willful, deliberate, and premeditated means the adoption of a specific intent to kill. The intent to kill must come into existence at some time before the killing, but need not exist for any particular length of time.

You have been instructed on more than one grade of homicide and if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant, and find him guilty of the lesser offense.

You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal shooting, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death.

All right, those are the instructions that you all will apply to the evidence that you have heard. Now these ladies and gentlemen will have an opportunity to argue their case before you.

MR. WOODSON: May it please the Court, Your Honor. Ladies and gentlemen of the Jury, I want to again

CERTIFICATION

I hereby certify that one copy of the attached Reply Brief For Petitioner was served on counsel for the Respondent, Donald R. Curry, Senior Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219, on October 25, 1999, by fascimile and by first class mail.

Barbara L. Hartung

Barbara L. Hartung

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 99-6615
99A307

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE WILLIAMS,

Petitioner

v.

JOHN B. TAYLOR, WARDEN,

Respondent

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit and on Application
for Stay of Execution

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

The Warden, by counsel, supplements his previously filed brief in opposition as follows:

I. THIS COURT'S PENDING DECISION IN PORTUONDO v. AGARD IS NO BASIS FOR EITHER STAYING PETITIONER'S EXECUTION OR REVIEWING HIS CASE.

In his reply to the Warden's brief in opposition, Williams offers several reasons why this Court should either grant a stay or grant certiorari in his case on the basis of his so-called "Agard" claim. None has any merit:

17pp

Not The Same Issue

Williams admits that the claim under review in Agard involves a prosecutor's allegedly improper jury argument, while Williams' claim objects to the prosecutor's cross-examination.[1] But, according to Williams, "[t]his is a distinction without a difference." (Reply 2).

The Second Circuit, however, expressly recognized the difference and concluded that the difference mattered: "We...express no opinion as to the...constitutionality of similar remarks made during cross-examination***summation remarks raise constitutional issues which either are not present or are of less concern when made upon cross-examination." Agard v. Portuondo, 117 F.3d 696, 708 (2d Cir. 1997). It is quite obvious, then, that this Court's ultimate decision in Agard will not impact a claim, like Williams', which is based upon cross-examination rather than jury argument.

Barred by "New Rule" Doctrine

Petitioner expressly admits that the "new rule" doctrine is not at issue in Agard. (Reply 3). Nor does he dispute that the Fourth Circuit ruled in his case that his claim is barred by the "new rule" doctrine. These admissions, by themselves, are ample grounds for denying his certiorari petition.

Williams nonetheless argues that, even though the Fourth Circuit's "new rule" rejection of his claim will not be impacted by this Court's decision in Agard, the Court should grant certiorari in his case to decide the merits of the Fourth Circuit's "new rule" decision. In other words, even though this Court has granted ***the State's*** certiorari petition in Agard to decide whether the Second Circuit's ruling in a prisoner's favor is constitutionally valid, the Court simultaneously should grant certiorari in Williams' case ***just in case*** the Court decides in Agard

[1] Williams tacitly admits that he has preserved no claim with respect to the prosecutor's jury argument.

to rule in the prisoner's favor. Merely to state such a "cart before the horse" proposition is to recognize its absurdity.

Harmless Error

Finally, petitioner acknowledges that the Fourth Circuit also expressly found that his claim, at most, would constitute harmless error under Brecht v. Abrahamson, 507 U.S. 619 (1993), but argues that the Fourth Circuit erred by emphasizing his inculpatory testimony. (Reply 4). According to petitioner, absent the prosecutor's cross-examination of him about having heard all the other witnesses testify, he likely would not have been convicted of capital murder.

This Court, however, should not grant certiorari or a stay merely to review the Fourth Circuit's fact-specific application of the correctly-stated and clearly-established Brecht standard. Moreover, both the district court (Ptn. App. 18) and the Fourth Circuit (Ptn. App. 5, 7) – both of whom are intimately familiar with the requirements of Virginia law regarding proof of capital murder – recognized that, in light of Williams' highly inculpatory testimony (which obviously preceded the prosecutor's cross-examination), there was no reasonable likelihood that he would have been convicted of anything less than the capital murder of Mr. Keller. Indeed, by Williams' own admission, it was his idea to commit the armed robbery, his idea to burn down the Kellers' home and, most importantly, he admitted that he fired the first shot into Mr. Keller's head after Mrs. Keller had been raped and after the two victims had been marched into the woods behind their home to be executed. See Williams v. Commonwealth, 450 S.E.2d 365, 370 (Va. 1994). And, as the Fourth Circuit expressly found, despite Williams' speculation that the bullet he admits he fired into Mr. Keller's head may not have been "lethal" (Reply 4 n.1), the testimony of the medical examiner was that "each gunshot wound suffered by Mr. Keller contributed to his

death." (Ptn. App. 5). The Fourth Circuit correctly concluded that nothing more is required under Virginia law to sustain a conviction for capital murder.[2] (Ptn. App. 5).

II. THE FOURTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 2254(e)(2) IS A MOOT POINT BECAUSE, AS PETITIONER CONCEDES, THE COURT OF APPEALS REJECTED HIS CLAIMS UNDER PRE-AEDPA LAW.

Williams admits that, even though the Fourth Circuit interpreted 28 U.S.C. § 2254(e)(2) in his case, it also rejected his claims that he was entitled to an evidentiary hearing under pre-AEDPA law. He nevertheless insists that this Court should grant certiorari because the Fourth Circuit's interpretation of the statute "conflicts" with the decision of other circuits. Conspicuously absent from Williams' reply, however, is any answer to the Warden's reliance upon this Court's decision in Breard v. Greene, 118 S.Ct. 1352 (1998) or to the Warden's demonstration that all of the other decisions upon which Williams relies – unlike the situation in both Breard and Williams' case – involved claims that had been raised in state court and preserved for federal review. (See Br. Op. 11 n.8).

Moreover, as petitioner has acknowledged, the Fourth Circuit's decision in Cardwell v. Greene, 152 F.3d 331 (4th Cir. 1998), is perfectly consistent with the cases from other circuits upon which he relies. Thus, petitioner has demonstrated, not a "conflict" between circuits but, at best, merely an intra-circuit conflict which clearly does not warrant certiorari review. See generally Wisniewski v. United States,353 U.S. 901, 902 (1957). In reality, moreover, the Fourth Circuit's decision in Williams' case is perfectly consistent with Cardwell; petitioner

[2] Obviously, the alleged error could have had absolutely no effect on Williams' death sentence; ***he murdered six people during a short period of time while on parole***. Williams does not even suggest otherwise.

merely disagrees with the Court of Appeals' fact-specific determination that he failed to develop his claims (indeed, he failed to even ***raise*** his claims) in state court.

As for Williams' argument that this Court should grant certiorari merely to review the Fourth Circuit's fact-specific application of the pre-AEDPA "cause and prejudice" standard to his claims, the Warden generally will rely upon his previously-filed brief in opposition and offers only the following specific rebuttal:

Juror Stinnett

With respect to Juror Stinnett, Williams' speculation about the "relationship" between the juror and her ex-husband of 15 years (Reply 7 n.3) is just that; it is not evidence. The only evidence is that they had very infrequent contact since their divorce. (JA 1425a at ¶ 2).

With respect to Virginia law regarding valid jury challenges for "cause," Williams simply is wrong. Disclosure of the fact that Stinnett was Meinhard's ex-wife or that the prosecutor once had represented Meinhard would ***not*** have been the basis for a valid challenge for cause. See Lilly v. Commonwealth, 499 S.E.2d 522, 531 (Va. 1998) (mere fact that juror related to officer/witness does not require exclusion for cause). Indeed, even if the prosecutor once had represented Stinnett rather than Meinhard, the juror would not have been excludable for cause on that basis alone. See Roach v. Commonwealth, 468 S.E.2d 98, 109 (Va.), cert. denied, 519 U.S. 951 (1996).

The Psychological Report

With respect to petitioner's claim regarding the alleged withholding of Jeffrey Cruse's psychological report, Williams has attempted to mislead the Court in several ways:

First, Williams asserts that he raised the claim in federal court because he was afforded "resources denied in state court." (Reply 5). This assertion, however, was flatly contradicted by the district court which expressly held that Williams had discovered and raised the claim in federal

court ***with precisely the same "resource" he had been afforded in state court, namely, a court-appointed lawyer.*** (Ptn. App. 55).

Second, Williams asserts that he "filed an extensive Brady request" during the state habeas proceedings, implying that he filed such a request with the Virginia Supreme Court and it was denied. (Reply 9). What he refers to, however, is merely ***a letter*** his state habeas attorney sent to opposing counsel asking the Commonwealth in a collateral case to comb its files for any possible exculpatory evidence. (JA 376-380). The Commonwealth's reply advised Williams that any such discovery request should be filed with the state habeas court and the Commonwealth made no representation to Williams as to whether any such exculpatory evidence existed. (JA 381-382). The only discovery request that Williams ever filed with the state habeas court, however, was a request to force the Commonwealth to reveal Cruse's place of incarceration. (JA 398-399).

Finally, Williams asserts that, if he had been provided with the psychological report, his testimony "would have been unnecessary" and he would not have testified in such a highly inculpatory manner. (Reply 11). This assertion, however, is flatly contradicted by the sworn affidavit of his two trial attorneys which demonstrates Williams' "insistence throughout [the attorneys'] preparation for the case that he wanted to tell the jury what had occurred." (JA 1161).

III. THE OVERWHELMING AND UNREFUTED EVIDENCE IS THAT CRUSE TESTIFIED TRUTHFULLY AT TRIAL THAT HE HAD NO AGREEMENT WITH THE PROSECUTION.

Cruse testified at trial under oath that he had no agreement with the Commonwealth. (JA 170). During the state habeas proceedings, the Commonwealth's Attorney of Cumberland County and Cruse's trial attorney both submitted affidavits affirming the accuracy of Cruse's testimony. (Resp. Supp. App. 1-4; JA 1398-1401). During the federal habeas proceeding, Cruse's trial attorney submitted another affidavit, not only making unequivocally clear that

Cruse had no agreement or understanding, formal or informal, with the Commonwealth, ***but also swearing under oath that Williams' federal habeas attorney had attempted to get him to sign a false affidavit.*** (Resp. Supp. App. 5-8; JA 1402-1405).

Despite the overwhelming and unrefuted evidence, Williams asserts without any support in the record, that Cruse's attorney admitted to Williams' federal habeas counsel that there was an understanding between Cruse and the Commonwealth.[3] (Reply 13 n.10). This outrageous falsehood is typical of William's tactics throughout these proceedings and should not be tolerated.

Williams' reliance upon the prosecutor's jury argument regarding Cruse's credibility – "his back is against the wall; if he lies he dies" (Reply 12) – is misplaced. First, it is elementary that a Brady claim, as a matter of law, cannot be premised upon a matter that has been spread upon the record since the time of trial. Moreover, the prosecutor's argument meant nothing more than that if Cruse had ***any*** hope of avoiding a death sentence the last thing he could afford to do would be to be caught in a lie.[4] In view of Cruse's sworn trial testimony and the unrefuted affidavits of both the Commonwealth's Attorney and Cruse's trial attorney, the prosecutor's jury argument is a manifestly insufficient and speculative basis for granting federal collateral relief.

---

[3] The only alleged "support" for Williams' outrageous assertion is the false affidavit which Cruse's trial attorney refused to sign. (JA 1405 ¶ 5). This Court must dispose of Williams' petition without regard to habeas counsel's unsupported, hearsay assertion.

[4] At other times, Williams has relied upon Cruse's acknowledgement at trial that "the judge" was going to decide whether he "lived or died." (JA 178). Like the prosecutor's jury argument, however, this is a matter that has been spread upon the record since the time of trial. In any event, Cruse's testimony represented nothing more than the indisputable fact that, under Virginia law, it ultimately is up to the trial judge to decide whether a death sentence actually should be imposed. See Va. Code § 19.2-264.5.

CONCLUSION

The petition for a writ of certiorari and the application for a stay of execution should be denied.

Respectfully submitted,

JOHN B. TAYLOR, WARDEN

By: _____
Counsel

Donald R. Curry
Senior Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4856

CERTIFICATE OF SERVICE

I certify that I am a member of the bar of this Court and that on October 26, 1998, I faxed a copy of the Respondent's Supplemental Brief in Opposition to the Clerk of this Court and faxed and mailed a copy to the office of Barbara Hartung, Esquire, 1001 East Main Street, Suite 504, Richmond, Virginia 23219, counsel of record for the petitioner.

_____
Donald R. Curry
Senior Assistant Attorney General

RESPONDENT'S SUPPLEMENTAL APPENDIX

AFFIDAVIT

1. I am Robert G. Woodson, Jr. I was the Commonwealth's Attorney for Cumberland County from 1989 to 1995. I prosecuted both Michael Williams and Jeffrey Cruse for capital murder in 1994. I presently am a General District Court judge in the 10th Judicial Circuit.

2. During the investigation of the capital crimes for which I prosecuted Williams and Cruse, I initially entered into a written plea agreement with Cruse and his attorney whereby Cruse would have been spared a death sentence. One of the conditions of the agreement, however, was that Cruse tell the complete truth and, when it subsequently was learned that he had breached this condition with respect to the rape of Mrs. Keller, I revoked the plea agreement.

3. At the time Cruse testified against Williams in January of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty.

4. I do not recall specifically whether Williams' trial counsel were provided with an actual copy of Cruse's initial plea agreement, but I am confident that they were. A copy of this prior agreement was introduced at trial, however, and I know that Williams' attorneys were aware prior to trial of the substance of the prior agreement, as well as the fact that it had been revoked because Cruse had not been entirely truthful.

5. One of the other conditions of Cruse's initial plea agreement was that he take a polygraph test. Before such a test was administered, however, I learned that Cruse had not been truthful about the rape of Mrs. Keller and I revoked the plea agreement. Cruse later admitted that both he and Williams had raped Mrs. Keller. Because the plea agreement was revoked and

because Cruse admitted his involvement in the rape, a polygraph examination of Cruse was not conducted.

Robert G Woodson Jr
Robert G. Woodson Jr

Subscribed and sworn to before me by Robert G. Woodson, Jr. this 14th day of February, 1996.

Carolyn Z. Helgeson
Notary Public

My commission expires: 8/30/99

AFFIDAVIT

1. I am Donald C. Blessing. I am a lawyer licensed to practice in the Commonwealth of Virginia. Together with Lee Harrison, I represented Jeffrey Cruse on his charges of capital murder and other related felonies in Cumberland County.

2. Prior to being represented by Mr. Harrison and me, Cruse had been represented by James Baber. Before Mr. Harrison and I entered the case, Cruse and Mr. Baber had entered into a written plea agreement with the Cumberland Commonwealth's Attorney, whereby Cruse would have been spared a death sentence. This written plea agreement, however, was revoked by the Commonwealth's Attorney because Cruse had breached the agreement by not telling the complete truth about the offenses.

3. I was present in Cumberland Circuit Court when Cruse testified for the Commonwealth at the capital murder trial of Michael Williams. At the time of Williams' trial, Cruse had no plea agreement with the Commonwealth. Cruse testified truthfully at that trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence.

4. I do not have a specific recollection of whether Williams' trial attorneys asked our permission to interview Cruse prior to Williams' trial. I can state with certainty, however, that if such a request had been made, we would not have permitted Williams' attorneys to interview Cruse.

Donald C. Blessing

Subscribed and sworn to before me by Donald C. Blessing this 7th day of February, 1996.

Notary Public

My commission expires: October 31, 1998.

AFFIDAVIT

1. I am Donald C. Blessing. I am a lawyer licensed to practice in the Commonwealth of Virginia. Together with Lee Harrison, I represented Jeffrey Cruse on his charges of capital murder and other related felonies in Cumberland County.

2. Jeffrey Cruse's co-defendant was Michael Wayne Williams. During Williams' state habeas corpus proceedings, I submitted an affidavit in which I stated: "At the time of Williams' trial, Cruse had no plea agreement with the Commonwealth. Cruse testified truthfully at [Williams'] trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence." This statement was true then, and it is true now.

3. On March 5, 1997, I was contacted by Williams' federal habeas counsel, Mr. James Moore. Mr. Moore later faxed to me a draft of an affidavit for my consideration. A copy of the draft is attached. Upon reading the draft, I telephoned Mr. Moore and informed him unequivocally that paragraph 5 of the draft affidavit was not true and that, during my earlier conversation with Mr. Moore, I never had told him that Cruse had "an understanding with the Commonwealth." I refused to sign the draft affidavit because the assertion made in paragraph 5 of the draft affidavit is not true.

4. I have been informed that on March 10, 1997, Williams' filed a document in federal district court which on page 32 states, "But in discussions by current counsel for Williams with Cruse's counsel about additional affidavits, Cruse's counsel has not completely refuted the possibility that some inducement from the Commonwealth existed." If this statement

is intended to be a reference to the contact between myself and Mr. James Moore described above, the statement is untrue.

5. At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth. At no time have I ever said or implied to Williams' habeas counsel, or to anyone else, that there was an informal agreement or understanding between Cruse and the Commonwealth.

Donald C. Blessing

Subscribed and sworn to before me by Donald C. Blessing this 11th day of March, 1997.

Notary Public

My commission expires: October 31, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center,

Respondent.

AFFIDAVIT OF
DONALD C. BLESSING

Donald C. Blessing, having been first sworn upon oath, states as follows:

1. I am a lawyer licensed to practice in the Commonwealth of Virginia. My law office is located in Farmville, Virginia.

2. I was appointed to represent Jeffrey Cruse on his capital murder and other related felony charges in Cumberland County arising from the February 27, 1993 murders of Morris C. Keller, Jr. and Mary Elizabeth Keller. Lee R. Harrison, Esquire, of Camersville, Virginia, had already been appointed to represent Cruse when I was appointed. Mr. Harrison and I were co-counsel for Jeffrey Cruse. Prior to being represented by Mr. Harrison and me, Cruse was represented by James C. Baber.

3. Before Mr. Harrison and I entered the case, Cruse and Mr. Baber had reached a written plea agreement with the Commonwealth's Attorney, whereby Cruse would have avoided a death sentence. This written plea agreement was revoked

by the Commonwealth because Cruse breached the agreement by not telling the complete truth about the offenses.

4. As I have stated in a prior Affidavit dated February 7, 1996, at the time Cruse testified at the January 1994 capital murder trial of Michael Wayne Williams in Cumberland County, Cruse had no formal plea agreement with the Commonwealth.

5. At the time Cruse testified at Williams' trial, Cruse did have an understanding with the Commonwealth that if he cooperated with the Commonwealth in preparation for Williams' trial and testified against Williams, his cooperation and testimony might help him with the capital murder charges and other felony charges he was facing in Cumberland County.

_____
Donald C. Blessing

COMMONWEALTH OF VIRGINIA,

CITY/COUNTY OF _____, to-wit:

Subscribed and sworn to before me this ____ day of March 1997.

My Commission expires: _____

_____
Notary Public

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(7)

No. 99-6615

Supreme Court, U.S.
FILED
NOV 23 1999
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In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

vs.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON, WAVERLY VIRGINIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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BARBARA L. HARTUNG*
1001 E. Main Street
Suite 504
Richmond, Virginia 23219
Telephone: (804) 649-1088

JAMES E. MOORE
CHRISTIAN & BARTON, L.L.P.
909 E. Main Street
Suite 1200
Richmond, Virginia 23219
Telephone: (804) 697-4100

Counsel for Petitioner

**Counsel of Record*

MARK L. EARLEY
Attorney General
DONALD R. CURRY*
Senior Assistant
Attorney General

Office of the Attorney
General of Virginia
900 E. Main Street
Richmond, Virginia 23219
Telephone: (804) 786-4856

Counsel for Respondent

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WILLIAMS V. TAYLOR, WARDEN
NO. 99-6615

RELEVANT DOCKET ENTRIES

State Court Proceedings

June 29, 1993	Indictments for Capital Murder and related offenses [Filed]
January 3-7, 1994	Capital trial. Petitioner sentenced to death by jury.
February 22, 1994	Trial court imposes death sentences.
November 4, 1994	Convictions and death sentences affirmed by the Virginia Supreme Court.
August 10, 1995	Order appointing state habeas counsel.
August 30, 1995	Incomplete petition for writ of habeas corpus filed in the Virginia Supreme Court with motion for leave to amend.
January 29, 1996	Amended petition for writ of habeas corpus filed in the Virginia Supreme Court.
March 18, 1996	Petition for writ of habeas corpus dismissed by Order of the Virginia Supreme Court. All motions denied.

Federal Court Proceedings

* * *

7/1/96	5	MOTION by Michael Wayne Williams for Appointment of Counsel, and by Michael Wayne Williams to Stay (lsal)

* * *

7/3/96	12	ORDER granting [5-1] motion by Michael Wayne Williams for Appointment of Counsel, granting [5-2] motion by Michael Wayne Williams to Stay; scheduled execution of Petitioner on 7-11-96 is stayed until further Order of this Court (signed by Judge Robert R. Merhige Jr.) Copies Mailed: y (jpar)
8/13/96	13	ORDER appointing James E. Moore, Esquire and Theodore F. Adams, III, Esquire as additional counsel for the petitioner. (signed by Judge Robert R. Merhige Jr.) Copies Mailed: y (lsal)

* * *

9/3/96	15	MOTION by Michael Wayne Williams SEALED EX PARTE. (lsal) [Entry date 09/04/96] [Edit date 09/05/96]
9/3/96	16	MOTION by Michael Wayne Williams SEALED EX PARTE (lsal) [Entry date 09/04/96] [Edit date 09/05/96]
9/3/96	17	MEMORANDUM by Michael Wayne Williams in support of [16-1] motion by Michael Wayne Williams SEALED EX PARTE (lsal) [Entry date 09/04/96] [Edit date 09/05/96]
9/5/96	18	ORDER (signed by Judge Robert R. Merhige Jr.) Copies Mailed to Petitioner's counsel. SEALED EX PARTE (lsal) [Edit date 09/05/96]

9/9/96	19	SUPPLEMENTAL MOTION by Michael Wayne Williams SEALED EX PARTE (lsal)
9/13/96	20	ORDER (signed by Judge Robert R. Merhige Jr.) copies Mailed: to petitioner's counsel. SEALED EX PARTE. (lsal) [Edit date 09/17/96]
9/18/96	21	ORDER that the Court's earlier Orders granting petitioner permission to proceed ex parte and under seal are hereby STAYED until the further Order of this Court. (signed by Judge Robert R. Merhige Jr.) Copies Mailed: y (lsal)

* * *

10/7/96	24	ORDER that the Court grants respondent's motion for an adversarial hearing for the limited purpose of assessing petitioner's need for confidentiality. Petitioner's counsel is requested to arrange a conference call with respondent's counsel to set an appropriate hearing date. (signed by Judge Robert R. Merhige Jr.) Copies Mailed: y (lsal)

* * *

10/23/96	28	IN OPEN COURT: Merhige, J., G. Halasz, OCR. Appearances: Parties by counsel. Matter came on for an adversarial hearing on Petitioner's motion to proceed ex parte. Arguments heard. Findings of Facts and Conclusions of Law stated from the bench. Petitioner's motion; taken under advisement. The Court directed Petitioner to file his

claims ex parte. The Court directed that it will review the claims in camera to determine if an adversarial proceeding is necessary. Matter continued until further Order of the Court. (:31) (walk) [Entry date 10/24/96]

* * *

10/24/96 29 MOTION by Michael Wayne Williams FILED UNDER SEAL EX PARTE per hearing on 10/23/96. (lsal) [Entry date 10/25/96] [Edit date 10/29/96]

10/24/96 30 MEMORANDUM by Michael Wayne Williams in support of [29-1] motion by Michael Wayne Williams. FILED UNDER SEAL EX PARTE per hearing on 10/23/96. (lsal) [Entry date 10/25/96] [Edit date 10/29/96]

* * *

10/31/96 33 ORDER that Petitioner through counsel, appeared before the Court after notice to the Respondent for purposes of demonstrating a need for confidentiality by reason of having requested services pursuant to 21 U.S.C. 848 (q)(9), and the Court directed an adversarial hearing wherein the Court expressed the view that it would be necessary for Petitioner to list his alleged claims to the end that the Court be advised by respondent of any which allegedly have been defaulted to which action Petitioner objected, but did, however, at the Court's request, file a list of his intended claims, which the Court has refrained from looking at and sealed until such time as the USCA for

the Fourth Circuit renders a decision as to whether said listed claims may be shown to Respondent as this court deems necessary (signed by Judge Robert R. Merhige Jr.) Copies Mailed: yes (scoo)

* * *

11/20/96 46 INITIAL PETITION for writ of habeas corpus with Exhibits A-E attached. (lsal) [Entry date 11/21/96]

* * *

11/21/96 48 CORRECTED INITIAL PETITION for writ of habeas corpus; (lsal) [Entry date 11/22/96]

* * *

12/10/96 50 RENEWED MOTION by Michael Wayne Williams for Expert Assistance and For Leave to Proceed Ex Parte and Under Seal for Purposes of Requesting Expert Assistance (lsal) [Entry date 12/11/96]

* * *

12/20/96 54 RESPONSE by J. D. Netherland to [50-1] motion by Michael Wayne Williams for Expert Assistance and For Leave to Proceed Ex Parte and Under Seal for Purposes of Requesting Expert Assistance (lsal) [Entry date 12/23/96]

12/20/96 55 MOTION by J. D. Netherland to Dismiss and Rule 5 Answer (lsal) [Entry date 12/23/96]

12/20/96	56	MEMORANDUM by J. D. Netherland in support of [55-1] motion by J. D. Netherland to Dismiss and Rule 5 Answer with Exhibits A-D received and placed in brown expandable. (lsal) [Entry date 12/23/96]

* * *

1/13/97	62	CJA 30, Authorization to Pay the Virginia Capital Representation Resource Center (Attention: Barbara L. Hartung, Esquire) $42,601.10, Voucher #40641, Part I (Signed by Robert R. Merhige, Jr.) (walk) [Entry date 01/21/97] [Edit date 07/11/97]

* * *

2/3/97	64	RESPONSE by Michael Wayne Williams to [55-1] motion by J. D. Netherland to Dismiss and rule 5 Answer (lsal) [Entry date 02/04/97]

* * *

2/21/97	65	REPLY by J. D. Netherland to response in opposition by petitioner to [55-1] motion by J. D. Netherland to Dismiss and Rule 5 Answer (lsal)

* * *

3/10/97	67	Response by Michael Wayne Williams to [65-1] reply by J. D. Netherland to Petitioner's Opposition to the Motion to Dismiss. (lsal)
3/11/97	68	Response by J. D. Netherland to [67-1] response filed by Michael Wayne Williams (lsal)

* * *

4/29/97	69	MOTION by Michael Wayne Williams to Invoke Discovery (lsal) [Entry date 04/30/97]
4/29/97	70	Statement of Documents to Be Produced filed by petitioner. (lsal) [Entry date 04/30/97] [Edit date 07/11/97]
4/29/97	71	Request for Subpoenas Duces Tecum filed by petitioner. (lsal) [Entry date 04/30/97] [Edit date 07/11/97]

* * *

5/9/97	75	CJA 30, Authorization to Pay James E. Moore, Esquire of Christian & Barton $55,280.69, Voucher #40621, Part I. (Signed by Robert E. Payne) (walk) [Entry date 05/12/97] [Edit date 07/11/97]

* * *

7/16/97	87	ORDER denying [69-1] motion by Michael Wayne Williams to Invoke Discovery (signed by Judge James R. Spencer) Copies Mailed: y (lsal)
7/31/97	88	SECOND MOTION by Michael Wayne Williams for Leave to Invoke Discovery (lsal)
8/7/97	89	RESPONSE by J. D. Netherland to [88-1] Second motion by Michael Wayne Williams for Leave to Invoke Discovery (lsal)
8/15/97	90	REPLY by Michael Wayne Williams to response to [88-1] motion by Michael

		Wayne Williams for Leave to Invoke Discovery (lsal)
		* * *
11/4/97	92	CJA 30, Authorization to Pay Barbara L. Hartung, Esquire $7,337.50, Voucher #40624, Part I (Signed by Judge Robert R. Merhige Jr.) (walk)
12/4/97	93	CJA 30, Authorization to Pay the Virginia Capital Representation Resource Center $14,867.19, Voucher #D40641, Final Payment (Signed by Judge Robert R. Merhige Jr.) (walk) [Entry date 12/20/97]
4/10/98	–	So Order: DENYING [29-1] motion by Michael Wayne Williams. FILED EX PARTE and UNDER SEAL. (signed by Judge Robert R. Merhige Jr.) Copies Mailed: yes, to pet.tioner only. (lsal) [Edit date 04/10/98]
4/13/98	94	MEMORANDUM OPINION (signed by Judge Robert R. Merhige Jr.) Copies Mailed: y (lsal)
4/13/98	95	ORDER all claims asserted in the petition except Claims I(A), IV(A)(1), IV(A)(5) be and the same are hereby DISMISSED; and evidentiary hearing on Claims I(A), IV(A)(1) and IV(A)(5) will be conducted commencing at 8:30 a.m. Monday, May 18, 1998. Counsel for each of the parties herein shall, by 1:00 p.m. May 13, 1998 file with the Clerk of this Court proposed findings of fact and conclusions of law. (signed by Judge Robert R. Merhige Jr.) Copies Mailed: yes. (lsal)

4/17/98	–	Evidentiary Hearing set for 8:30 a.m. on 5/18/98 before Judge Robert R. Merhige Jr. (walk)
4/17/98	96	MOTION by Michael Wayne Williams For Leave to Invoke Discovery (lsal) [Entry date 04/20/98]
4/17/98	97	PETITION for writ of habeas corpus ad testificandum (to produce Jeffrey Allan Cruse for deposition on 5/6/98) filed by petitioner Michael Wayne Williams (lsal) [Entry date 04/20/98]
4/20/98	98	RESPONSE In Opposition by J. D. Netherland to [96-1] motion by Michael Wayne Williams. For Leave to Invoke Discovery (lsal)
4/20/98	99	MOTION by J. D. Netherland for Summary Judgment (lsal)
4/20/98	100	MEMORANDUM in support of [99-1] motion by J. D. Netherland for Summary Judgment (lsal)
4/23/98	–	Motion hearing re: [99-1] motion by J. D. Netherland for Summary Judgment set at 8:30 5/5/98, [96-1] motion by Michael Wayne Williams For Leave to Invoke Discovery set at 8:30 5/5/98, [88-1] motion by Michael Wayne Williams for Leave to Invoke Discovery set at 8:30 5/5/98 (walk)
4/23/98	101	REPLY by Michael Wayne Williams to response to [96-1] motion by Michael Wayne Williams For leave to Invoke Discovery (lsal)

4/27/98	102	Response by J. D. Netherland to [101-1] response by Michael Wayne Williams (lsal) [Entry date 04/28/98]
4/27/98	103	MOTION with Memorandum in Support by Michael Wayne Williams by Michael Wayne Williams to Amend [95-1] the Court's judgment of 4/13/98 (ahar) [Entry date 04/28/98]
4/28/98	104	SUPPLEMENTAL MEMORANDUM by J. D. Netherland in support of [99-1] motion by J. D. Netherland for Summary Judgment and [100-1] Memorandum In Support (lsal)
5/1/98	105	RESPONSE In Opposition by J. D. Netherland to [103-1] Rule 59(E) Motion by Michael Wayne Williams to Alter or Amend [95-1] Court's judgment of 4/13/98 (lsal)
5/1/98	106	RESPONSE In Opposition by Michael Wayne Williams to [99-1] motion by J. D. Netherland for Summary Judgment (lsal)
5/1/98	107	AFFIDAVIT Pursuant to Fed. R. Civ. P. 56(F) Re: [106-1] Petitioner's Opposition to Warden's Motion for Summary Judgment (lsal)
5/4/98	108	NOTICE of Supplemental Authority by Michael Wayne Williams (lsal)
5/4/98	109	SUPPLEMENTAL EXHIBIT in Support of Petitioner's Memorandum Opposing [99-1] motion by J. D. Netherland for Summary Judgment (lsal)
5/4/98	110	REPLY by Michael Wayne Williams to response in opposition to [103-1] motion

		(petitioner's Rule 59(E) by Michael Wayne Williams to Alter or Amend [95-1] the Court's judgment of 4/13/98 (lsal)
5/5/98	111	IN OPEN COURT: Merhige, Jr., Gilbert Halasz, OCR. Appearances: Parties by counsel. Petitioner's motion to compel discovery and Respondent's motion for summary judgment heard and taken under advisement. (:57) (walk)
5/5/98	–	Motion hearing held re: [99-1] motion by J. D. Netherland for Summary Judgment by J. D. Netherland, [96-1] motion by Michael Wayne Williams For Leave to Invoke Discovery by Michael Wayne Williams, [88-1] motion by Michael Wayne Williams for Leave to Invoke Discovery by Michael Wayne Williams (walk)
5/14/98	–	Slip Opinion of Harvey Green v. James B. French submitted by defendant as followup documentation to Warden's pending Motion for Summary Judgment regarding Williams' claim IV(a)(1). (lsal)
5/15/98	–	LETTER by counsel for Michael Wayne Williams in response to Slip Opinion of Harvey Green v. James B. French submitted by defendant on 5/14/98. (lsal)
5/15/98	112	ORDER denying [103-1] motion by Michael Wayne Williams to Amend [95-1] the Court's judgment of 4/13/98; [99-1] motion by J. D. Netherland for Summary Judgment CONTINUED UNDER ADVISEMENT; denying [96-1] motion by Michael Wayne Williams For

		Leave Invoke Discovery. The evidentiary hearing is continued until 9:30 a.m. May 29, 1998. Proposed Findings of Fact to be filed by 1:00 p.m. May 26, 1998 (signed by Judge Robert R. Merhige Jr.) Copies Mailed: yes. (lsal)
5/18/98	113	MOTION by J. D. Netherland, Warden, respondent, to Stay and for Expedited Consideration in re: to stay its Order of April 13, 1998, and its Order of May 15, 1998. (lsal) [Edit date 05/19/98]
5/18/98	114	PETITION for writ of habeas corpus ad testificandum submitted by petitioner; (lsal)
5/18/98	115	MOTION by Michael Wayne Williams for Issuance of Subpoena to Judge Robert G. Woodson, Jr. for Attendance at Evidentiary Hearing (lsal)
5/18/98	–	Evidentiary Hearing reset for 9:30 a.m. on 5/29/98 before Judge Robert R. Merhige Jr. (walk)
5/18/98	116	ORDER directing the Warden of Mecklenburg Correctional Center to produce Petitioner (Inmate Number 165709) to the Marshal on May 29, 1998 at 9:30 a.m. for an evidentiary hearing in this matter (Signed by Judge Robert R. Merhige Jr.) A copy was faxed to the Warden this date and certified copies were mailed to the Warden, to the Virginia Department of Corrections, and to counsel of record. (walk)
5/18/98	117	Response by J. D. Netherland to [114-1] petition for writ of habeas corpus ad

		testificandum (lsal) [Entry date 05/19/98]
5/18/98	118	RESPONSE by J. D. Netherland to [115-1] motion by Michael Wayne Williams for Issuance of Subpoena to Judge Robert G. Woodson, Jr. for Attendance at Evidentiary Hearing (lsal) [Entry date 05/19/98]
5/19/98	119	RESPONSE by Michael Wayne Williams to [113-1] motion by J. D. Netherland, Warden, respondent, to Stay and for Expedited Consideration by Michael Wayne Williams (lsal)
5/19/98	120	REPLY by Michael Wayne Williams to response to [115-1] motion by Michael Wayne Williams for Issuance of Subpoena to Judge Robert G. Woodson, Jr. for Attendance at Evidentiary Hearing (lsal)
5/20/98	121	MOTION by J. D. Netherland to Quash Subpoenas (lsal)
5/20/98	–	LETTER from USCA to counsel in re: completing counsel of record forms and returning. (lsal)
5/21/98	122	RESPONSE by Michael Wayne Williams to [121-1] motion by J. D. Netherland to Quash Subpoenas Duces Tecum (lsal)
5/22/98	–	Evidentiary Hearing reset for 9:30 a.m. on 6/2/98 before Judge Robert R. Merhige Jr. (walk) [Entry date 05/27/98]
5/26/98	123	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW by J. D. Netherland (submitted in response to

Order of Court and received in Clerk's Office at 12:04 p.m.) (lsal)

5/26/98 124 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW by Michael Wayne Williams (lsal)

5/27/98 125 AMENDED ORDER the Warden of Mecklenburg Correctional Center shall deliver custody of the petitioner, Michael Wayne Williams #165709, to the U.S. Marshal at the U.S.D.C., 1000 E. Main Street, Richmond, Virginia on June 2, 1998 at 9:30 a.m. Clerk to send copies to petitioner, Warden of Mecklenburg Correctional Center, Department of Corrections for the Commonwealth of Virginia, and to the United States Marshal (signed by Judge Robert R. Merhige Jr.) Copies Mailed: yes. (lsal)

5/27/98 126 ORDER the evidentiary hearing is CONTINUED to June 2, 1998 at 9:30 a.m. (signed by Judge Robert R. Merhige Jr.) Copies Mailed: yes. (lsal)

5/27/98 – Copy of 5/27/98 Order mailed to: Petitioner Michael Wayne Williams; Warden, Mecklenburg Correctional Center; Dept. of Corrections for the Comm. of Va. attn: Director Ronald Angelone; and hand delivered to the United States Marshal. (lsal)

5/28/98 127 USCA Order that the Warden's application for an emergency stay is granted and the matter is remanded for further proceedings. On remand, the district court must determine whether, under

AEDPA, Williams is entitled to an evidentiary hearing on these claims; Until the district court has evaluated Williams' entitlement to an evidentiary hearing under the strict requirements of AEDPA, we believe it would be premature to act on any petition for a writ of mandamus and prohibition;'. (adoh) [Edit date 05/28/98]

5/29/98 – The Warden of Mecklenburg Correctional Center (Jerry Davis at (804) 738-6114 x147) was notified by telephone today that Order to produce Mr. Williams for June 2nd has been withdrawn. (walk)

5/29/98 128 REPLY by Michael Wayne Williams In Further Support of His Petition for a Writ of Habeas Corpus and of his Motion for an Evidentiary Hearing (lsal)

5/29/98 129 Response by J. D. Netherland to Stay Order Issued By the Court of Appeals (This Court invited the parties to file any additional briefs in the case no later than 5:00 p.m. on May 29, 1998). (lsal)

6/3/98 130 MEMORANDUM OPINION (signed by Judge Robert R. Merhige Jr.) Copies Mailed: yes. (lsal)

6/3/98 131 ORDER VACATING [95-1] order; petitioners federal habeas petition is DISMISSED in its entirety; DENYING AS MOOT [99] Motion for Summary Judgment by respondent; at expiration of 30 days unless an appeal has been filed, the Clerk shall return to the appropriate repository such records as the Court has

		received in reference to this cause; the action is dismissed with prejudice; DENYING AS MOOT all remaining motions not previously ruled on by the Court: [121-1] motion by J. D. Netherland to Quash Subpoenas, [115-1] motion by Michael Wayne Williams for Issuance of Subpoena to Judge Robert G. Woodson, Jr. for attendance at Evidentiary Hearing, and [113-1] motion by J. D. Netherland, Warden, respondent, to Stay and for expedited Consideration (signed by Judge Robert R. Merhige Jr.) Copies Mailed: yes. (lsal)
6/3/98	–	Case closed (lsal)
6/8/98	132	CJA 30, Appointment of Counsel, Barbara L Hartung, Esquire to represent Petitioner Michael Wayne Williams, Voucher #D40641, Final Voucher (Signed by the Clerk) (Nunc Pro Tunc 11/15/96) (walk)
6/17/98	133	MOTION with Memorandum in Support by Michael Wayne Williams to Alter or Amend [130-1] memorandum opinion and [131-1] order (lsal)
6/22/98	134	RESPONSE In Opposition by J. D. Netherland to [133-1] motion by petitioner to Alter or Amend [130-1] memorandum opinion and [131-1] order (lsal)
6/22/98	135	MEMORANDUM in support of [134-1] response in opposition to petitioner's Rule 59(E) Motion to Alter or Amend by J. D. Netherland (lsal)
6/23/98	136	ORDER the case is hereby REASSIGNED to the Honorable James R. Spencer.

		(signed by Judge James R. Spencer) Copies Mailed: yes. (lsal)
6/23/98	–	CASE reassigned to Judge James R. Spencer per Order entered 06/23/98. (lsal)
8/25/98	137	REPLY by Michael Wayne Williams to response to [133-1] motion to Alter or Amend [130-1] memorandum opinion and [131-1] order of June 3, 1998. (lsal) [Entry date 08/26/98]
8/27/98	138	Response by J. D. Netherland to [137-1] Supplemental Memorandum response by Michael Wayne Williams dated August 25, 1998. (lsal)
10/14/98	139	CJA 30 Authorization to Pay Barbara L. Hartung, Esq. $20,545.25 Voucher #D40641, No. 2 (Signed by Judge James R. Spencer) (lmcd)
11/12/98	140	ORDER denying [133-1] motion to Alter or Amend [130-1] memorandum opinion and [131-1] order (signed by Judge James R. Spencer) Copies Mailed: yes (bbay)
11/25/98	141	MOTION with Memorandum in Support by Michael Wayne Williams to Alter or Amend [140-1] order (lsal) [Entry date 11/27/98]
11/30/98	142	RESPONSE by J. D. Netherland to [141-1] motion to Alter or Amend [140-1] order by Michael Wayne Williams (bbay)
12/4/98	143	REPLY by Michael Wayne Williams to response to [141-1] motion to Alter or Amend [140-1] order by Michael Wayne Williams (jpar)

12/14/98 144 NOTICE OF APPEAL OF [21-1] order, [24-1] order, [33-1] order, [87-1] order, [0-0] so order, [95-1] order, [112-1] order, [131-1] order, [140-1] order by Michael Wayne Williams. TPO package given to attorney. NO FEE PAID. (lsal) [Entry date 12/15/98]

12/15/98 145 ORDER denying [141-1] motion to Alter or Amend [140-1] order (signed by Judge James R. Spencer) Copies Mailed: yes. (lsal)

12/23/98 146 AMENDED NOTICE OF APPEAL amending the [144-1] appeal by Michael Wayne Williams (lsal) [Entry date 12/28/98]

March 22, 1999 Appellant's Brief filed.

April 14, 1999 Respondent's Brief filed.

May 5, 1999 Appellant's Reply Brief filed.

August 2, 1999 Opinion of the Fourth Circuit Court of Appeals affirming and denial of the writ by the district court. Williams v. Taylor, No. 99-1.

October 28, 1999 Order granting petition for writ of certiorari and motion to proceed *in forma pauperis*.

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths present that MICHAEL WAYNE WILLIAMS on or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

> did, willfully, deliberately and with premeditation, feloniously, kill and murder Mary Elizabeth Keller in the commission of robbery of Mary Elizabeth Keller [and Morris C. Keller /s/ JS] while armed with a deadly weapon in violation of Section 18.2-31(4) of the Code of Virginia, 1950, as amended

against the peace and dignity of the Commonwealth of Virginia.

Witness: James E. Tyree, Virginia State Police
Claude B. Meinhard,
Cumberland Sheriff's Office

Sworn in Court and sent before the Grand Jury.

/s/ Carol O. Henshaw, Deputy
Clerk

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths present that MICHAEL WAYNE WILLIAMS on or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

did, willfully, deliberately and with premeditation, feloniously, kill and murder Morris C. Keller, Jr. [and Mary Elizabeth Keller /s/ JS] while armed with a deadly weapon in violation of Section 18.2-31(4) of the Code of Virginia, 1950, as amended

against the peace and dignity of the Commonwealth of Virginia.

Witness: James E. Tyree, Virginia State Police
Claude B. Meinhard,
Cumberland Sheriff's Office

Sworn in Court and sent before the Grand Jury.

/s/ Carol O. Henshaw, Deputy
Clerk

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths present that MICHAEL WAYNE WILLIAMS on or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

did, willfully, deliberately and with premeditation, feloniously, kill and murder Morris C. Keller, Jr. subsequent to [the rape of /s/ J.S.] Mary Elizabeth Keller in violation of Section 18.2-31(5) of the Code of Virginia, 1950, as amended

against the peace and dignity of the Commonwealth of Virginia.

Witness: James E. Tyree, Virginia State Police
Claude B. Meinhard,
Cumberland Sheriff's Office

Sworn in Court and sent before the Grand Jury.

/s/ Carol O. Henshaw, Deputy
Clerk

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths present that MICHAEL WAYNE WILLIAMS on or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

did, willfully, deliberately and with premeditation, feloniously, kill and murder Mary Elizabeth Keller subsequent to [the rape of /s/ JS] Mary Elizabeth Keller in violation of Section 18.2-31(5) of the Code of Virginia, 1950, as amended

against the peace and dignity of the Commonwealth of Virginia.

Witness: James E. Tyree, Virginia State Police
Claude B. Meinhard,
Cumberland Sheriff's Office

Sworn in Court and sent before the Grand Jury.

/s/ Carol O. Henshaw, Deputy
Clerk

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths present that MICHAEL WAYNE WILLIAMS on or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

did, willfully, deliberately and with premeditation, feloniously, kill and murder Morris C. Keller, Jr. and Mary Elizabeth Keller as a part of the same act or transaction in violation of Section 18.2-31(7) of the Code of Virginia, 1950, as amended

against the peace and dignity of the Commonwealth of Virginia.

Witness: James E. Tyree, Virginia State Police
Claude B. Meinhard,
Cumberland Sheriff's Office

Sworn in Court and sent before the Grand Jury.

/s/ Carol O. Henshaw, Deputy
Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE
COUNTY OF CUMBERLAND

Commonwealth of Virginia	Criminal No.
V.	
MICHAEL WAYNE WILLIAMS	

MOTION FOR DISCOVERY AND INSPECTION

Comes now defendant, Michael Wayne Williams, by and through counsel, pursuant to the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and section Eight and Eleven of Article I of the Constitution of Virginia, and pursuant to Rule 3A:11 of the Rules of the Supreme Court of Virginia, and moves for an order permitting discovery and inspection. In this motion, wherever reference is made to "the Commonwealth," the request shall be deemed also to request the same facts and information of whatever form, source or nature which are within the knowledge, custody and/or control of (1) the Commonwealth's Attorney or his assistants, (2) the Virginia State Police, (3) the Cumberland County Sheriff's Department, (4) the Prince Edward Sheriff's Department (5) the Prince Edward Police Department, (6) any other law enforcement departments or agencies of this or any other state or of the federal government which the Commonwealth's Attorney believes might reasonably be expected to have such information, or (7) any person whom the Commonwealth's Attorney may call as witnesses in this case.

A. The defendant moves for an Order requiring the Commonwealth's Attorney to give defendant access to the following:

1. All alleged confessions or statements of any kind made by defendant or any alleged co-defendant or co-conspirator that may be pertinent to this case in every media in which each such confession or statement may exist (in substance or verbatim), including without limitation audio tape, video tape, film, stereotype, short-hand notes, print, typing or handwriting. If any version (in any medium) of any such confession or statement previously existed and has since been lost or destroyed, the facts surrounding each such occurrence, including without limitation the reasons therefore, shall be fully disclosed to the defendant. The statements would include declarations purportedly uttered by any alleged co-defendant or co-conspirator in furtherance of an alleged common and illegal design as well as any statements of alleged co-defendants or co-conspirators which the Commonwealth claims are attributable to defendant as an alleged co-defendant or co-conspirator, giving the name of the person allegedly making the statements, the date and circumstance under which the statement's were allegedly made, and the text or substance of the statements.

* * *

B. The defendant moves for an Order directing the Commonwealth forthwith to make inquiry and disclose all of the following within the possession, custody or control of the Commonwealth, or the existence of which is known or by the exercise of due diligence could become known to the Commonwealth.

1. Any statements allegedly made by any person which show or tend to show any information within the knowledge or possession of the Commonwealth which tends to be exculpatory, mitigating or otherwise favorable to defendant.

2. Any other information of whatever form, source or nature which tends to be exculpatory, mitigating or otherwise favorable to defendant or which would tend to reduce the penalty which he might suffer, should he be convicted in this cause.

3. Any and all records and information revealing prior felony convictions or guilty verdicts or juvenile adjudications attributed to each witness to be called by the Commonwealth at any hearing in or trial of this case, including but not limited to relevant "rap sheets."

4. Any and all records and information revealing prior misconduct or bad acts attributed to any witness.

5. Any and all consideration or promises of consideration given to or on behalf of any potential witness or expected or hoped for by any witness. By "consideration" defendant refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to such a potential witness or to persons of concern to such a witness, including but not limited to formal or informal, direct or indirect; leniency, favorable treatment, recommendation or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, tax court, court of claims, administrative or other dispute with the Commonwealth, with another sovereign, with any local government, with any other authority or with any other parties; criminal, civil or tax

immunity grants' witness fees or special witness fees; provisions of food, clothing, shelter, transportation, legal services or other benefits; placement in a "witness protection program" or equivalent benefits; informer status of any potential witness; and anything else which arguably could reveal an interest, motive or bias in any witness in favor of the Commonwealth or against defendant or act as an inducement to testify or to color testimony.

6. Any and all threats, express or implied, direct or indirect or other coercion made or directed against any potential witness, any criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against any potential witness; any probationary, parole, deferred prosecution or custodial status of any potential witness; and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions involving any potential witness with the Commonwealth or over which the Commonwealth has real, apparent or perceived influence.

* * *

9. Any and all information in any personnel files for any potential witness which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the Commonwealth's evidence, including without limitation the personnel file of any co-defendant or co-conspirator who is a potential witness and any official internal affairs, internal investigation or public integrity investigation files relating to or connected with each potential witness who was or is a law enforcement officer.

10. Any and all other records and/or information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the Commonwealth's evidence or which arguably could lead to such records or information.

11. Disclosure of whether any potential witness has ever (i) taken a polygraph test, (ii) submitted to a drug interview, (iii) submitted to an interview under hypnosis, or (iv) been the subject of a psychological stress evaluation (PSE) to determine deception.

* * *

16. Any other evidence of the circumstances of the crime or the character and record of any party to the crime that would tend to show that another party was more culpable, more dominant or more dangerous than the defendant.

* * *

Wherefore, the defendant respectfully prays that the court order that any information relevant to trial of this case that the Commonwealth does not make available to the defendant through discovery be reviewed by the court *in camera* to determine whether the information is constitutionally required to be disclosed to the defendant in any part of the capital trial.

In sum, as grounds for this motion the accused states:

1) Defendant has been charged with the offense of capital murder under Va. Code Ann. 18.2-31( ).

2) In order for the defendant to be afforded effective assistance of counsel, and to ensure the heightened

degree of reliability demanded in capital cases, the Commonwealth must be ordered to disclose all exculpatory evidence, and all information necessary for effective preparation and defense.

MICHAEL WAYNE WILLIAMS

By /s/ R. Donald Ford
Counsel

By /s/ Lucretia A. Carrico
Co-Counsel

CERTIFICATE

We hereby certify that we have mailed, postage prepaid, a true and exact copy of the foregoing Motion to Robert G. Woodson, Jr., Attorney for the Commonwealth, Post Office Box 165, Cumberland, Virginia 23040, this 23rd day of June, 1993.

/s/ R. Donald Ford
R. Donald Ford

/s/ Lucretia A. Carrico
Lucretia A. Carrico

Filed in the Clerk's Office of the Circuit Court of Cumberland County, Virginia.
This the 24th day of June 1993 at 9A.m.

/s/ Imogene W. Illegible
Clerk

Virginia:

In the Circuit Court of Cumberland County, July 26, 1993.

Commonwealth of Virginia

Vs. Order — Offense Date: 2-27-93

Michael Wayne Williams — Birth Date: 1-25-68
SSN: 230-25-0805

This day came the defendant, Michael Wayne Williams, with his counsel, R. Donald Ford, Jr. and Lucretia Carrico, and presented to the Court his motion for Discovery and Inspection; also came the Attorney for the Commonwealth of the County of Cumberland in opposition to said motion.

It appearing to the Court upon review of the aforesaid motion and argument of counsel in this matter, that such motion for discovery moves for discovery of some material which should be denied, it is therefore ordered that the Attorney for the Commonwealth of the County of Cumberland shall comply with all of the requirements of discovery and inspection as set forth in the Rules of the Virginia Supreme Court and case law.

This motion is continued on the docket for any further issues raised by defense counsel or by the Commonwealth's Attorney.

ENTER: Sept 15, 1993

/s/ Illegible
Judge

Seen and Objected To:

/s/ R. Donald Ford, Jr.
R. Donald Ford, Jr.

/s/ Lucretia Carrico
Lucretia Carrico

[Seen] /s/ Warren Von Schuch
Warren Von Schuch

[Seen] /s/ Robert G. Woodson, Jr.
Robert G. Woodson, Jr.

[Entered 12/695]

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF CUMBERLAND

COMMONWEALTH OF VIRGINIA

v.

MICHAEL WAYNE WILLIAMS

THE HONORABLE JOHN R. SNODDY, JR., PRESIDING

Trial – Day One
Cumberland, Virginia
January 3, 1994

APPEARANCES:

ROBERT G. WOODSON, ESQUIRE
WARREN B. VON SCHUCH, ESQUIRE
Count of Cumberland
Cumberland, Virginia
(Representing the Commonwealth)

R. DONALD FORD, JR., ESQUIRE
LUCRETIA A. CARRICO, ESQUIRE
2727 Buford Road, Suite D
Richmond, Virginia 23235
(Representing the Defendant)

* * *

[115] The three prospective jurors entered the Courtroom and were sworn by the Deputy Clerk.)

THE COURT: State your name.

MR. CHICK: Dwayne Chick.

THE COURT: What's your name?

MS. CARTER: Ruby Carter.

MS. STINNETT: Bonnie Stinnett.

THE COURT: Now, I want all of you all to answer these questions when you are asked questions. See, it has to go on the record, so speak up. If I ask you something, don't shake your head or anything, just answer yes or no. And if I ask you something else, to elaborate, then you can [116] do that. This involves, again, Commonwealth versus Michael Wayne Williams. He's charged with twelve felonies. Included is capital murder, or rather murder involved with rape. He's also charged with arson, and robbery, and abduction of Mr. and Mrs. Keller. And I have the following questions for you: Are you related by blood or marriage to the defendant, Michael Wayne Williams, or the alleged victims of these offenses, Morris C. Keller. Jr. and Mary Elizabeth Keller, or any of the attorneys, Mr. Woodson, Mr. Von Schuch, Mr. Ford. or Ms. Carrico.

JURORS: (No affirmative response.)

THE COURT: Are you related by blood or marriage to any of these people?

JURORS: (No affirmative response.)

THE COURT: Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?

JURORS: (Two have no affirmative response.)

MR. CHICK: Yes.

THE COURT: Who have you been represented by?

MR. CHICK: My daddy's been represented by –

THE COURT: I'm not talking about your daddy. I asked you if you had ever been represented.

MR. CHICK: Oh, no, sir.

THE COURT: Are you personally acquainted with [117] the defendant or were you personally acquainted with the deceased victims?

MR. CHICK: Yes, I knew them. They used to be my neighbors.

THE COURT: Who?

MR. CHICK: The Kellers.

THE COURT: Would that have any effect on your ability to serve as an impartial juror in this case?

MR. CHICK: No.

THE COURT: Have you or any member of your immediate family ever been the victim of a murder, robbery or rape?

JURORS: (No affirmative response.)

THE COURT: Do you have any interest in this trial or the outcome of the case?

MR. CHICK: Yes, I –

THE COURT: What?

MR. CHICK: I mean, yeah. Yes.

THE COURT: Gentlemen, do you have any suggestion [sic]?

MR. FORD: If I might talk with my client Just a minute?

THE COURT: I don't want to taint the other jurors.

MR. VON SCHUCH: Judge, talking with Mr. Ford, I [118] thought we might do it mutually, but I think Mr. Ford would like to ask him just a few questions to verify some things before he agrees to anything. So I guess what we would do at this point is just go ahead and continue with the questioning and then –

THE COURT: Then we'll talk about that afterwards.

MR. FORD: That's fine. Judge.

THE COURT: Have you acquired any information about any of these offenses of the defendant, Michael Wayne Williams, from the news media or any other source? That is, have you read any reports on this case in any newspaper or heard any reports on this case either on the radio or television?

MS. STINNETT: I have not.

MS. CARTER: I've heard it on the radio and in the newspaper.

MR. CHICK: I've heard it on the radio.

THE COURT: Have you formed any opinion as to the guilt or innocence by virtue of what you have heard or read?

JURORS: (No affirmative response.)

THE COURT: Considering what you have read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is [119] presented before you reach any fixed opinion or conclusion concerning the guilt or innocence of the accused?

JURORS: (All answered affirmatively.)

THE COURT: All three answered yes. Do you understand that an indictment returned by a Grand Jury is merely a formal legal proceeding drawn up alleging the commission of a crime and the fact that a Grand Jury has returned an indictment against the defendant is not evidence against him and you should not consider it in determining guilt or innocence of the accused? Do you all understand that?

JURORS: (All answered affirmatively.)

THE COURT: It is the law of the Commonwealth of Virginia that no one is to be convicted of a crime unless and until his guilt is proven beyond a reasonable doubt. Will you, in accordance with the law – that is, would you, as a juror, refuse to convict anyone of a crime unless and until his guilt has been proven to your satisfaction beyond a reasonable doubt?

JURORS: (All answered affirmatively.)

THE COURT: All three say yes?

JURORS: (All answered affirmatively.)

THE COURT: Do you understand that the defendant is presumed to be innocent? This presumption

of innocence remains with the defendant throughout the trial? Do you [120] understand that?

JURORS: (All answered affirmatively.)

THE COURT: Do you understand that in order to convict the defendant in a criminal case, it requires the unanimous belief of the jury that the evidence establishes the guilt of the defendant beyond a reasonable doubt and, further, that a decision is not to be reached in a criminal case until all of the evidence has been presented, the instructions of the law have been given to the jury, and the arguments of counsel have been made? Do you understand that?

JURORS: (All answered affirmatively.)

THE COURT: Are you sensible of any bias or prejudice towards or against the Commonwealth of Virginia or the defendant –

JURORS: (No affirmative response.)

THE COURT: – or any of the attorneys participating?

JURORS: (No affirmative response.)

THE COURT: Have you ever served on a jury before?

JURORS: (Two have no affirmative response.)

MS. CARTER: Yes, I have.

THE COURT: How long has it been since you've served?

[121] MS. CARTER: Four or five years ago.

THE COURT: Do you know of any reason whatsoever why you cannot give a fair and impartial trial to both the Commonwealth and the defendant based solely on the law and the evidence?

JURORS: (No affirmative response.)

THE COURT: The defendant in this case is charged with capital murder, which is an offense which carries a possibility of punishment by death should he be found guilty of that offense. Evidence will be presented first on the question of the defendant's guilt or innocence. In other words, there are almost two trials. First you will hear evidence on the guilt or innocence. If the defendant is found guilty of capital murder, the jury shall so state in their verdict, and then evidence will be presented by the Commonwealth and the defendant as to whether the sentence should be death or life imprisonment. If the jury finds the defendant guilty of a lesser offense on the charge of capital murder, then the jury will impose a sentence within the limits given in the instructions of the Court. Do you understand that?

JURORS: (All answered affirmatively.)

THE COURT: Do any of you have any religious, conscientious or moral objections to the imposition of the death penalty in a proper case?

[122] JURORS: (No affirmative response.)

THE COURT: If the jury finds the defendant guilty of capital murder, would you automatically vote to impose the death penalty; automatically?

JURORS: (No affirmative response.)

THE COURT: Would you automatically refuse to give the death penalty?

JURORS: (No affirmative response.)

THE COURT: Would you be willing to wait until you have heard such additional evidence as might be presented as to the proper sentence and then impose a sentence which appears to be proper on the evidence and the instructions of the Court?

MR. CARNES: (All answered affirmatively).

THE COURT: This trial may or may not become lengthy. Would the length of the trial affect your ability as a juror to render an impartial decision after a full consideration of the evidence?

JURORS: (No affirmative response.)

THE COURT: This is a case involving capital murder. I expect that there will be introduced at trial pictures of a graphic nature of the victims. There will also be graphic testimony about the murders. Would the graphic nature of the evidence affect your ability as a juror to render an impartial decision after a full [123] consideration of the evidence?

JURORS: (No affirmative response.)

THE COURT: Are any of you involved in law enforcement?

JURORS: (No affirmative response.)

THE COURT: Are any of you related to the following people who may be called as witnesses: Robert W. Scanlon; Lisa C. Schiermeier; Ann D. Jones; Deborah

Kay; Robert B. Hallett; William Massella, III; John Howard Williams; George Li, L-i; Special Agent R. A. Jenkins; Special Agent William C. Hicks; Special Agent Richard Holt; Special Agent James Tyree; Verena Ann James; Jose Albert Lozano: Barbara Waycaster Dunn; Robert Dean Ramey; Tammy Lyan Tolley; Elizabeth K. Jones; Sharon Lee Sine; David Edward Sine; Special Agent Wayne Hipkins; Jeffrey Alan Cruse; Deputy Sheriff Claude Meinhard; Special Agent Herbert Chambers; Special Agent James Adcock; Trooper John Ewers; Glenn Haskins; Special Agent M. Joseph Ritchie; Mary Carter Williams; Raymond J. Williams; Patricia Costable Atkinson; Agnes Villalobos; Special Agent Barry Keesee; Agnez Devina Piper; Mary Nieves; Richard B. Horn, Jr.; Martha Keller; James Keller; Carolyn Lipscomb; John Williams; Warren Green; Janet McCay; Laura St. John; Gwen Marshall; Arthur Howard Williams; Thomas Spry; Dr. Dewey Cornell?

[124] JURORS: (No affirmative response.)

MR. VON SCHUCH: Mr. Chick, is it?

MR. CHICK: Yes.

MR. VON SCHUCH: And I'll get to you, Ms. Stinnett and Ms. Carter, in just a bit. I just have a few additional questions to what the Court asked you. I noticed that during the voir dire you indicated to the Court that you used to live next to the Kellers?

MR. CHICK: Yes.

MR. VON SCHUCH: How long did you live next to them? For what period of time did you know them?

MR. CHICK: About fifteen years.

MR. VON SCHUCH: And what was your relationship with them?

MR. CHICK: Well, I just spoke to them when I saw them.

MR. VON SCHUCH: You weren't personal friends with them? You didn't stay at their house frequently?

MR. CHICK: No.

MR. VON SCHUCH: Just kind of a neighbor relationship?

MR. CHICK: Yes.

MR. VON SCHUCH: There was a point in time, I believe, when the Williams' used to live near the Kellers. Did you know John Williams?

[125] MR. CHICK: Yeah, I knew of him. I'd see him walking down the road.

MR. VON SCHUCH: You know who he is?

MR. CHICK: Yes.

MR. VON SCHUCH: Have you ever talked to him?

MR. CHICK: Yeah, I used to speak to him.

MR. VON SCHUCH: Were you two friends? Did you do anything together –

MR. CHICK: No.

MR. VON SCHUCH: – play baseball, go to school, anything like that?

MR. CHICK: No.

MR. VON SCHUCH: What about the defendant, Mr. Michael Williams?

MR. CHICK: Well, yeah, I used to see him in the stores, and walking down the road.

MR. VON SCHUCH: And how long have you known him?

MR. CHICK: I guess about five years, I'd say, because he moved in with Wayne – His mother moved in with one of my neighbors, Wayne Lipscomb, and then that's how come they moved down there.

MR. VON SCHUCH: And what were the types of things that you and the defendant used to do?

MR. CHICK: We didn't do nothing. I just spoke to him when I saw him in the store.

[126] MR. VON SCHUCH: Just, "Hi. How are you?"

MR. CHICK: Yeah.

MR. VON SCHUCH: And that's all?

MR. CHICK: Yes.

MR. VON SCHUCH: Now, you understand that there is some significant decisions that you may have to make if you are seated as a member of this jury? Do you understand that?

MR. CHICK: Yes.

MR. VON SCHUCH: You know the Kellers?

MR. CHICK: Yes.

MR. VON SCHUCH: I mean, you lived next to them for fifteen years.

MR. CHICK: Yes.

MR. VON SCHUCH: You know the defendant?

MR. CHICK: Yes.

MR. VON SCHUCH: All right. And you understand you may be asked to sentence him to death, based on what he did to the Kellers?

MR. CHICK: Yes.

MR. VON SCHUCH: In view of all that. do you think you can sit fairly and impartially and decide the evidence in this case?

MR. CHICK: Yeah, I believe so. They didn't actually live next to me, but they lived like a quarter of [127] a mile up.

MR. VON SCHUCH: What I'm talking about is this, is that you seem to know all the parties. You obviously, you thought he was a nice guy and you used to say hi to him. and you knew his brother, you probably liked him and said hi to him, and on the other hand you lived next to the Kellers and you knew who they were and you would wave to them when you would see them.

MR. CHICK: Yes.

MR. VON SCHUCH: My question for you is that in view of the fact that you're going to hear a lot of gruesome things that happened to the Kellers, on the other hand you're going to have to pass judgment on this gentleman here, who you've known for five years and say hi to, is that going to cause you any problem? Are you going to be able to stand there and pass a proper judgment; are you going to be able to listen to this evidence fairly and impartially and do what's right?

MR. CHICK: I don't see no problem. I believe I could.

MR. VON SCHUCH: Well, you say "You believe." Can you or can't you?

MR. CHICK: Yeah.

MR. VON SCHUCH: Do you have any reservation whatsoever?

[128] MR. CHICK: No.

MR. VON SCHUCH: Ms. Carter, I noticed that you indicated you had prior jury service?

MS. CARTER: Yes.

MR. VON SCHUCH: And that was about, I think you said, four or five years ago?

MS. CARTER: Yes.

MR. VON SCHUCH: Was that a criminal or a civil case?

MS. CARTER: Civil.

MR. VON SCHUCH: Other than that, you've never sat in a criminal case before? You've never been through that experience?

MS. CARTER: No.

MR. VON SCHUCH: When the Court was talking to you about the two-part trial, and the fact that the first part of it will be solely a determination as to whether the defendant is guilty or not guilty of capital murder, and the second part of it you'll hear additional evidence in mitigation and then you'll have to decide one of two possible penalties. And I noticed that when the Court indicated would you automatically impose life, you seemed to hesitate a little bit when you answered that question. Is there any particular reason for that? Could you fairly consider the death sentence in this case?

[129] MS. CARTER: Yes.

MR. VON SCHUCH: Was there a reason for your hesitation or –

MS. CARTER: No, no reason.

MR. VON SCHUCH: – or was I picking up something that wasn't there?

MS. CARTEL: Yeah. Like I said, after he finished the other part, then I put it together.

MR. VON SCHUCH: In other words, what we're asking you is, and the type of juries that we want are people who are going to be fair. That's all we're asking for, is a fair shake. And if you have any predisposition towards life or towards death, then how fairly are you going to be able to Judge that evidence in making

that decision? We want to make sure that you're going to be able to do that.

MS. CARTER: I understand what you're talking about.

MR. VON SCHUCH: Okay, and there was no – You understand?

MS. CARTER: No, I understand.

MR. VON SCHUCH: Thank you, Ms. Carter. That's all the questions I have.

MR. FORD: Good afternoon. As with any Commonwealth's Attorney and defense attorney, I think I saw [130] the hesitation the other way. The Judge asked you whether you would automatically impose the death penalty and you hesitated before you answered, it appeared to me. And again, I guess my question is, you have to sit in judgment of Mr. Williams and if the Commonwealth, in your mind, proves beyond a reasonable doubt that he's guilty of capital murder. then you must then decide, based on evidence that you hear. whether to inflict death or not. And I need to know whether you would automatically give Mr. Williams death in that situation, if you found him guilty of capital murder beyond a reasonable doubt, or would you be substantially impaired from considering life, I guess is the other way to say it? It's kind of a backwards kind of situation. If you felt that capital murder was such a bad crime that it deserved death, without hearing anything else about it, then we need to know about that at this point.

THE COURT: I believe you're leaving out again – I'd like for you, again, to state that there would be further evidence given then.

MR. FORD: There would be further evidence in the penalty phase.

THE COURT: I think to be fair to them; that's the reason it's all in one instruction.

MR. FORD: Right. Would any of you vote [131] automatically for the death penalty, after hearing evidence in both the guilt phase and the penalty phase, if you found him guilty? I'm not suggesting that you will or won't, but if you find him guilty beyond a reasonable doubt in the capital murder phase, and then after hearing evidence in the penalty phase, would you automatically vote for death?

MR. VON SCHUCH: Judge, I would object to that. I don't think that, the question. The question is after they have convicted him and after they've found him guilty of capital murder. would they automatically impose – Heck, after they hear the evidence in the penalty phase, you know, there's no telling what they may want to do, but that's not the relevant issue. The relevant issue is, are they going to listen to the evidence fairly; would they automatically vote after finding him guilty, not after they hear the evidence in the penalty phase.

MR. FORD: I asked that question and the Court advised me to ask it another way.

THE COURT: Well, the thing about it is, they wouldn't have any opportunity to do that.

MR. FORD: I'm sorry, Judge.

THE COURT: They wouldn't have any opportunity until they had heard the other; would they automatically at that time. Isn't that right, gentlemen?

MR. VON SCHUCH: Yes, sir, Judge. I understood [132] his question to be, after they have convicted him of capital murder and after they had heard all of the evidence in the penalty phase, would they automatically sentence him to death. Well, that evidence that they may hear in the penalty phase may affect exactly what they way do, but that's not the issue, as long as they've listened to it fairly and impartially and listen to others before reaching their decision. But the issue is after he's convicted.

THE COURT: All right, go ahead. Ask it the way you asked it first.

MR. FORD: Back to the question that I asked before, and I think you've been asked it a couple times, but you hesitated when the Judge asked you, that if you find him guilty of capital murder beyond a reasonable doubt, would you automatically, based on that finding, give him the death penalty.

MS. STINNETT: I hesitated because I wanted a clarification of the evidence. When the statement was first made about automatically, I hesitated then because I didn't understand that that would be after the evidence. In other words, knowing that the evidence had been presented would be very important to me, before automatically doing anything. Does that make sense?

MR. FORD: Well, the word "automatically" troubles me, I guess.

[133] MS. STINNETT: The word "automatic" troubled me, too.

MR. FORD: Well, and your response to the word "automatic" troubled me and I guess the question is, when you say evidence, after the evidence has been presented, there's a distinguishing between the evidence of guilt and the evidence after the penalty phase. If you would consider, right then and there, after the guilt phase, of giving him the death penalty without any further evidence, then obviously we've got a problem.

MS. STINNETT: No, I wouldn't automatically. I'm speaking for myself.

MS. CARTER: Well, that's the part, when he was asking, that's why I hesitated, too, because you said automatically; but, not, like I said, not automatically, until the evidence is presented.

MR. FORD: Even in the penalty phase, you could consider life – after convicting someone of capital murder, you could consider life after hearing evidence in the penalty phase, is that what I'm hearing from you?

MS. CARTER: Yes.

MS. STINNETT: Yes.

MR. FORD: Mr. Chick?

MR. CHICK: Not automatically. It depends on how bad the crime was and what all was done.

[134] MR. FORD: Well, let me ask – That leads to my next question. If you have a situation where there is a premeditated murder without any legal justification,

meaning no evidence of self-defense or intoxication or anything like that, and the murder is committed during the commission of a robbery or subsequent to the rape of one of the victims, would that fact pattern alone substantially impair your ability to decide this case or to consider, after all of the evidence is heard, giving Mr. Williams a consideration of life versus death?

MS. STINNETT: No, not that alone.

MR. FORD: Would that fact pattern be so upsetting to you that life would not be a possibility after hearing all of the evidence?

MS. CARTER: Let me think. No.

MR. FORD: But you hesitated again.

MS. CARTER: Like I say, in weighing the evidence. I'm – After the evidence is presented and you get, you know – I'll say no. I'll go with, you know, like life. It's confusing. I can't really –

THE COURT: She doesn't understand the question.

MS. CARTER: I don't.

MR. FORD: Well, I guess what I'm trying to ask you is that if that fact pattern – the premeditated murder without justification and it was in the commission of a [135] rape or subsequent to a rape or in the commission of a robbery – would those facts be so bad in your mind that you would block out any consideration of a life sentence?

MS. CARTER: Yes.

MR. FORD: You would block out any consideration of a life sentence. Mr. Chick, what about you?

MR. CHICK: No, I wouldn't.

MR. FORD: You would be able to consider life, based on that fact pattern?

MR. CHICK: Yeah – No – Yes.

MR. FORD: Yeah, no, yes. I mean, I don't mean to be –

THE COURT: Which is it, yes or no?

MR. CHICK: Yes.

MR. FORD: You would be able to consider a life sentence?

MR. CHICK: Yes.

THE COURT: And how about you, ma'am?

MS. STINNETT: Well, the way he asked the question was different from the way he asked it to him, the way I responded. I said no, because I'm saying that would not be all – I would not use that fact pattern to determine. That fact pattern alone would not –

MR. FORD: Okay. Well, that's my question.

MS. STINNETT: That's what I'm saying. Whereas [136] to him, it was put a little differently.

MR. FORD: Well, I think I put it to him just directly, if you had that fact pattern, could you consider life still?

MS. STINNETT: Yes.

MR. FORD: As the Judge has alluded, and as counsel has alluded, there will be two prongs or two trials to this. If you find him guilty beyond a reasonable doubt of capital murder – and again, I don't suggest that that will or won't happen – but if we get to the penalty phase there are certain factors in mitigation that we may present, so the next couple of questions that I ask you will be based upon those possible factors. The first would be Attention Deficit Disorder. Do any of you know what that is?

MS. STINNETT: Yes.

MR. FORD: Being a teacher, I would imagine you would. And again, I don't ask this to – I didn't know that much about it either, so I'm not trying to say you don't know anything – You don't know anything about that?

MS. CARTER: No, I don't.

MR. FORD: And how about you, Mr. Chick?

MR. CHICK: No.

MR. FORD: Also, drug and alcohol dependency. Do you or any member of your immediate family have experience [137] with problems with drug or alcohol dependency? Again, you don't have to say the name of the person, but a yes or no answer to that particular question.

JURORS: (No affirmative response.)

MR. FORD: And the third factor might be sexual abuse. And again, not directed to you, but have you or an immediate member of your family ever experienced

or been the victim of sexual abuse or a sexual abuse crime?

JURORS: (No affirmative response.)

MR. FORD: Mr. Chick, a couple of follow up questions, I guess, because you've got some personal involvement or you –

MR. CHICK: I've been thinking about it and I would feel kind of awkward sitting on a jury, because I know the whole family of the Kellers. I've sat here and thought about it and I would feel kind of awkward.

MR. FORD: I don't blame you. No further questions.

THE COURT: I'm going to excuse Mr. Chick, but the other two, would you all come forward, please? Follow the lady. Mr. Chick, you may be excused.

(The prospective jurors exited the Courtroom.)

* * *

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

* * *

[19] MR. WOODSON: May it please the Court, Your Honor. Ladies and gentlemen of the Jury, I'm Bobby [20] Woodson, the Commonwealth Attorney of Cumberland County, and seated next to me is Mr. Warren Von Schuch from Chesterfield, who is helping to prosecute this case. Next to Mr. Von Schuch is Mr. Donald Ford and Ms. Lucretia Carrico, who are representing the defendant, Mr. Michael Williams, seated at the end of the table. We appreciate you serving on this Jury. We know you have to give up a lot, your jobs and other things that you are obligated to, but we really do appreciate your coming and serving and carrying out this most important duty.

We apologize for being late this morning. There were some things we had to get together, and we do apologize for starting late. This is a case that involves a couple in Cumberland County, a Morris C. Keller, Jr. and his wife, Mary Elizabeth Keller. They lived over in the Trent's Mill area. The case against Mr. Williams charges him with certain crimes he committed against Mr. and Mrs. Keller, those charges being on February 27th of this year, 1993, entering their house while armed with a deadly weapon, without their permission. It involves the robbery of Mr. and Mrs. Keller. It involves the rape of Mrs. Keller. It involves the kidnapping and abduction of Mr. and Mrs. Keller. It involves the capital murder of Mr. and Mrs. Keller. It involves arson of the house of Mr. and Mrs. Keller.

[21] We will go through and present evidence that we have gathered, to you. What we say today is not evidence. What I say today is not evidence. It's what I think the evidence will be once the Commonwealth finishes with its case of putting evidence on. The evidence you need to listen to is what will come from the stand, from the witnesses who will testify to you. I'm going to go through and tell you and indicate to you what we feel the evidence will show. Sometime after the holidays, after Christmas time, Jeffrey Cruse came to this area from the Stafford County/Fredericksburg area. He had met a member of the Lozano family in that area through employment and came down here to stay with them for a while in Cumberland and be employed down here.

Michael Williams was associated with the Lozano family and knew the Lozano family. He was living in Cumberland County prior to the holidays and during the holidays and Mr. Cruse did not come to Cumberland until after the holidays. Mr. Cruse, Jeffrey Cruse, and Michael Williams met through the Lozano family and became best of friends. You will hear testimony from the Lozano family that they had seen Michael Williams with a .357 Black Hawk Ruger pistol. You will hear testimony that they had seen Mr. Williams with that gun before Mr. Cruse came to Cumberland. You will also hear testimony that subsequent [22] to that they saw Mr. Cruse with the same pistol, that Mr. Williams had given the pistol at some point to Mr. Cruse to hold for him. On the night of February 27th, Mr. Williams and Mr. Cruse were at the home of the Lozano family, a home they were renting which is next to the Cumberland County Public Library,

just next to the Cumberland County High School just up Highway 60.

They were there. Albert Lozano was there; Verena James, who you will hear from; Michael Williams; Jeffrey Cruse, and some other people. Mr. Williams came up with the idea that he was going to rob a place. He and Mr. Cruse talked about that. Mr. Williams then offered Mr. Albert Lozano one thousand dollars if he would take him to a certain location. Mr. Lozano was drinking too much, knew it didn't sound right, knew that Mr. Williams didn't have the money, the one thousand dollars, and it just didn't sound right, and refused. Mr. Williams then approached Ms. Verena James, who is the sister to Mr. Lozano, and asked her, not anything about offering her any money or anything, but just asked her would she carry Michael Williams and Jeffrey Cruse to his home which is located down on Highway 45, going towards Cartersville.

She agreed to drive them down there and they did leave her house which she was living in, renting along [23] with her mother, about 8:30 that night on February 27. It was the three of them, Ms. James, Jeffrey Cruse and Michael Williams. They traveled down 60 and down 45, headed toward Cartersville, to where Michael Williams' mother was living, which the house is located just a little ways below a wood yard which was operated by one of the victims in this case, Morris C. Keller, Jr. They went to Mr. Williams' house. Mr. Williams went in the house; Ms. James stayed in the car; Mr. Cruse stayed in the car. Mr. Cruse made Ms. James swear to him that if he told her a secret that she would not tell anybody, especially not tell Mr. Williams. She did make that promise that she would

not disclose a secret and at that point he pulled out the .357 Black Hawk Ruger and showed it to her and said that "Michael Williams has given me this gun to hold for him. It belongs to Michael, but please don't tell him I showed it to you." She did that, she did not tell Mr. Williams, and then Mr. Williams returned to the car and they left the house.

Mr. Williams then directed her how to drive through some back roads, through some dirt roads, through the forest area, and they came out in a location just below the Bear Creek Market. If you know, it's down Route 622, close to the area where you go into Bear Creek Lake. At that point Mr. Williams said that they were going to his [24] cousin's house, or to a party, and that he didn't want her driving down the driveway to the house because his cousin didn't like people coming in there. So she let them out on the hard-surfaced road on Route 622. She left and came back to Cumberland. That was the end of it as far as she was concerned.

Mr. Williams and Mr. Cruse then proceeded to walk in the same way she drove toward Cumberland Courthouse to Bear Creek Market, the place which Mr. Williams had planned with Mr. Cruse to rob. When they got to Bear Creek Market, it was closing or had closed and they decided that it would not be a good idea to rob that place. The situation was just not correct. At that point, Mr. Williams said, "I know another place that would be easy to take. We'll go there." They then turned and proceeded to go north on Route 622, about a mile and a half, and they went past a house where Mr. Williams had previously lived with his mother and his stepfather. They passed that house and kept on for maybe a mile or three-

quarters of a mile and came up to the driveway of Mr. and Mrs. Keller.

The evidence will show you that the driveway of Mr. and Mrs. Keller leads a good ways off the road to their house and cannot be seen from the house. The evidence will show to you that whoever went to that house had to know that house was back off the road. And [25] remember, Mr. Cruse didn't come to this area – he didn't come until after the holidays. He didn't know Mr. and Mrs. Keller. He never had met Mr. and Mrs. Keller. He didn't know where they lived at, but Mr. Williams did. Mr. Cruse did not, but Mr. Williams had lived in Cumberland County at various intervals during his life, had been here, was out here before Christmas, had lived near Mr. Keller. At the time this happened he was living with his mother just a little ways below the wood yard that Mr. Keller ran. They went to that house and at that point Mr. Williams had gotten the .357 back from Mr. Cruse. He had the .357.

The evidence will show you that the .357 had only two bullets in it. At that point the plan was made that Mr. Cruse would go up and knock on the door and at the point Mr. Keller or Mrs. Keller came to the door, then they would go into the house. They did that. Mr. Cruse knocked on the door. Mr. Keller came to the door. At that point Mr. Cruse was at the door and Mr. Williams was right behind him with the .357 pistol. When Mr. Keller opened the door, Mr. Cruse opened the front door and he and Mr. Williams walked in. Mr. Williams then stuck the gun at Mr. Keller. At that point Mrs. Keller was in the kitchen. She came out of the kitchen area. Subsequent to that, Mr. Williams and Mr. Cruse directed Mr. and Mrs. Keller to go into the kitchen. At that point Mr. Williams

made Mr. Keller and [26] Mrs. Keller take all their clothes off, where they were nude, and made them sit on chairs in the kitchen area.

At that point the evidence will show you that Mr. Williams stood guard over them with the .357 while Mr. Cruse searched through the house to see what he could find to steal. Mr. Cruse did find a .38 pistol. He found several rifles and he found a shotgun. At some point those were loaded into a Jeep Cherokee which belonged to Mr. and Mrs. Keller. At some point in time Mr. and Mrs. Keller, while still nude, were put into a closet in the front living room while Mr. Williams and Mr. Cruse still looked through the house for what they could steal. You will find that some money was taken and some other items were taken. At a point in time after that Mrs. Keller was removed from the front closet and taken to a back closet, still nude, and Mr. Keller was left in the front closet.

Subsequently, it came to a point that Mr. Williams decided that they would rape Mrs. Keller. Mrs. Keller was taken into a back bedroom and was then raped by Mr. Williams. After Mr. Williams raped Mrs. Keller, then Mr. Cruse proceeded into the bedroom and then he raped Mrs. Keller. At that point in time you have to remember Mr. Cruse had the .38 pistol, which was fully loaded, and Mr. Williams had the .357 with two shots in it.

[27] At the time Mr. Williams had finished his attack on Mrs. Keller and left the bedroom, he switched guns with Mr. Cruse and he then had the fully loaded .38. Mr. Cruse had the .357 and Mr. Williams had the fully loaded .38. Then Mr. Cruse raped Mrs. Keller. After he finished

his attack on Mrs. Keller, then Mr. and Mrs. Keller were returned to the kitchen and they were both made to take a shower by Mr. Williams. He made both of them take a shower together. He made both of them put their clothes on when they finished the shower. Then they were returned to the kitchen area and Mr. Williams then told Mr. and Mrs. Keller that he was going to take them for a walk.

All during this time, Mrs. Keller had been begging Mr. Cruse and Mr. Williams not to hurt them, had been pleading with them not to hurt Mr. and Mrs. Keller. At that point in the kitchen, she pleaded again not to hurt them. Mr. Williams said, "We're not going to hurt you. We're just going to take you to the woods for a walk and lose you." At that point, just before they left the house, Mrs. Keller asked, "Can I take my marriage certificate? Can I have my marriage certificate to take with me?" She was allowed to get her marriage certificate in a frame and carry it with her. The evidence will then show you that Mr. and Mrs. Keller walked down a wood road, snow on the ground, approximately 11:30 at night, February 27th, walked [28] about three or four hundred yards down this road. When they got to that point, Mr. Williams directed them to turn and walk over into a thick area and away from the road, where there was thick underbrush.

At that point there was a discussion and it was decided that Mr. Williams would point his pistol – At this point Mr. Williams has the .38, which is fully loaded and which he had gotten in the house. After he finished his attack on Mrs. Keller, he'd gotten the .38 and left Mr. Cruse with the .357 with only two bullets in that. So at this point when they walk down the wooded road, Mr.

Williams has the .38, fully loaded. Mr. Cruse had the .357 with two bullets in that. There's some discussion that Mr. Cruse should only shoot the .357 one time and save one bullet. There's a discussion that Mr. Williams will point the .38 at Mr. Keller and Mr. Cruse will point the .357 at Mrs. Keller and they will shoot on the count of three. When the count of three was done, Mr. Williams shot Mr. Keller in the head and he fell to the ground. Mr. Cruse did not shoot.

Mr. Williams then turned to Mr. Cruse and said, "No witnesses," and then Mr. Cruse did shoot Mrs. Keller with the .357. The evidence will show you at that point that Mr. Cruse turned to leave the woods, Mr. Williams then proceeded to empty the .38 into [29] Mr. and Mrs. Keller to make sure there were no witnesses. At that point they then left the real underbrush area and walked out on the wooded road and at that point Mr. Williams handed the .38 to Mr. Cruse and asked him to reload it because Mr. Cruse was the one at the house who had found the .38 and had gotten some bullets and put in his pocket. He then gave the .38 back to Mr. Williams and reloaded. Mr. Cruse did that and he took the spent cartridges out, and it will be shown where he threw the cartridges to, and those cartridges have been discovered.

You will hear the experts who will come and tell you what they found in the lab work as far as the rape of Mrs. Keller, which corroborates Mr. Cruse. You will hear the ballistics experts come and tell you about what kind of gun the cartridges were fired out of. There was a bullet found on the ground there next to the bodies. There was a bullet found in the body bag of Mrs. Keller. There was a bullet found in the head of Mrs. Keller. There was a jacket

found which came off of the .357. There was a jacket found in the body of Mrs. Keller. The experts will tell you from the evidence it only shows that one shot was fired from that .357. The other bullet that was found in the body bag, the four cartridges that were found, spent cartridges that were found in the area of the crime scene, could not have been shot by the .357. It had to have been [30] shot by another gun other than the .357.

Also, I would point out that the testimony will show that only two bullets were in the .357 when they went to the house that night. At that point Mr. Cruse and Mr. Williams returned to the house of Mr. and Mrs. Keller and proceeded to set the house on fire. First, they loaded some other items into the Jeep; a microwave, color T.V., stereo, speakers. They loaded those items into the Jeep, set the house on fire and then drove to the Fredericksburg area. They arrived in the Fredericksburg area the next morning. You will hear from witnesses who will identify Mr. Williams and Mr. Cruse as being in the Stafford County area on the morning of February 28th and the afternoon of February 28th, selling property, and that property will be identified as property which came from Mr. and Mrs. Keller. You will also hear from officers in the Fredericksburg area that they discovered the Jeep that belonged to Mr. and Mrs. Keller, which had been burned on the Rappahannock River. You will also hear from the bus driver who drove Mr. Williams and Mr. Cruse back to Richmond, and he can identify them as riding on his bus, coming back to Richmond.

You will hear evidence that Mr. Michael Williams had called his brother, Johnny Williams, to come and pick him up in Richmond and that Mr. Johnny Williams [31] did

pick him up in Richmond. You will hear evidence that .38 has not been located. It has not turned up. The .357 was found in the Rappahannock River. Mr. Cruse showed the law enforcement where that pistol was thrown into the river. You will hear that Michael Williams threw the pistol into the river. That pistol has been located and will be here to present to you. I would also point out to you that the experts from the lab will tell you that when the pistol was found in the river, there was only one .357 bullet in it. It had been reloaded with some .38s, but it was one .357 jacketed bullet left in there.

We believe that after you hear all of this evidence that the Commonwealth will put on, that you will return verdicts against Mr. Williams, guilty convictions on all of these charges. We ask you again to listen to the evidence very carefully coming from the witness stand. What I'm saying is not evidence. It's what we think the evidence will show to you. Again, I appreciate the attention you will give to this matter and really appreciate the duty you are doing in coming to serve today. Thank you.

MR. FORD: Judge, may I relocate myself up here somewhere?

THE COURT: Yes, sir.

MR. FORD: Thank you. I'm a little [32] disadvantaged. I finally discovered Cumberland's – This is the first time I've tried a case up here and being in the middle of a counsel table makes it tough back and forth. My name is Don Ford and, along with Lucretia Carrico, I am privileged, I would say, to represent Michael Williams. I think it's a privilege for any defense attorney to take on a case of this magnitude. When we talked to you

before in voir dire, we made some efforts to educate you as to what this case was going to be about. We mentioned, of course, murder, rape, robbery, and it wasn't going to be a pretty sight. And, obviously, any kind of case of this magnitude, it's not going to be. You're going to have graphic photos and you're going to have graphic testimony.

What we are asking you to do is to follow what the Judge has already told you in voir dire and what he will tell you again. The burden is always on the Commonwealth to prove its case beyond a reasonable doubt. We are simply asking you to keep that in mind, that the defendant is presumed to be innocent until you have found that the Commonwealth has proven each and every element of each and every charge beyond a reasonable doubt. So I don't want you to sit up here and listen to this wave of evidence, because the Commonwealth, quite frankly, has forty or fifty witnesses who are going to come up here as [33] in a parade and prove to you, or attempt to prove to you, certain things. So it's going to look like a lot of quantity versus not much quantity on our side, but I will tell you that quantity doesn't make the case, quality does.

So I would ask you to keep an open mind through the entire proceedings and don't just shut down after the Commonwealth puts its case on. But essentially what we're going to think and we want to kind of direct your attention to, we think the important part of this case is going to be who pulled the trigger, who is the trigger man, because in a capital murder case the trigger man is the one that is guilty of capital murder. We will show to you, we believe, the evidence will be in conflict as to who

was the actual trigger man out there in those woods on February 27th.

We will not dispute that Michael Wayne Williams was not there. I think that would test your credibility or my credibility, obviously. But I think that you need to be sure and listen and pay particular attention to the evidence as it relates to what happened in the woods after the majority of this stuff had already gone on. It's not pretty. We can't make excuses for a lot of what happened, but I think you as jurors have sworn to uphold the law and to follow the Judge's instructions, and I know you will. And, again, I want to make sure that I echo [34] Mr. Woodson's sentiments that I appreciate your coming out here. It's going to be a day or two longer to try this case. I know you'll sit attentively and listen to everything and I thank you for your time.

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CUMBERLAND

COMMONWEALTH OF VIRGINIA

v.

MICHAEL WAYNE WILLIAMS

THE HONORABLE JOHN R. SNODDY, JR., PRESIDING

TRIAL – DAY TWO

Cumberland, Virginia
January 4, 1994

* * *

[82] The witness, OFFICER CLAUDE MEINHARD, having first been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Could you give the ladies and gentlemen of the Jury your name, please?

A Claude Meinhard, Deputy Sheriff, Cumberland Sheriff's Department.

Q Officer Meinhard, were you so employed on February 28th of 1993?

A Yes, I was.

Q On that date did you have occasion to respond to the residence of a Morris and Mary Elizabeth Keller?

A I did.

[83] Q Can you indicate to the ladies and gentlemen what you had occasion to see and do there, please?

A Yes. At approximately 9:45 a.m. on that date I received a call from the dispatcher to go to the Keller residence on Route 617 in Cumberland County. When I arrived there, the house was completely burned. The fire department was on the scene.

Q Could you keep your voice up so the ladies and gentlemen can hear you?

A An investigation revealed that both Mr. and Mrs. Keller were missing, along with a 1987 Jeep Cherokee bearing license number MEW-BOP.

Q Did you have occasion to make a missing persons' report as a result of that discovery?

A Yes, I did.

Q What about the Jeep; what notification was given insofar as being on the lookout for that type of a vehicle?

A There was a B.O.L. sent out for Mr. and Mrs. –

Q When you say a "B.O.L.", that's a what?

A That's "be on lookout" for Mr. and Mrs. Keller and for the vehicle bearing that license number.

Q Calling your attention then to March 1st, [84] did you have occasion to receive a phone call from a young lady by the name of Jean Ownby?

A Yes, I did.

Q As a result of that, what did you do?

A As a result of that, I talked with one of her employees.

Q And who was that?

A Verena James.

Q After you received that information from Ms. James, what did you do?

A After I received the information, I got with Special Agent Tyree and we went to interview Mr. Cruse at the Lozano residence.

Q Now, you said Officer Tyree was with you; is that correct?

A Yes.

Q At that time did you have occasion or did Officer Tyree, in your presence, have occasion to recover any property?

A We did. Mr. Cruse agreed to come to the Sheriff's Office with us for the interview. We interviewed him there. When he came out of the house, he had on a pair of cowboy-type boots and we asked him for permission to have the boots to compare with some foot impressions, and he gave us the boots.

[85] Q After the interview that you had with Mr. Cruse, what was done with him?

A Later the same night or same day –

Q He came down here and talked to you, is that correct?

A Yes.

Q You didn't learn much, I guess?

A No; we didn't.

Q He was released?

A He was released.

Q Sometime later on that evening, did you have occasion to receive another phone call?

A I did.

Q And who was that from; Ms. Ownby?

A It was from Ms. Ownby.

Q After receiving that information from Ms. Ownby, what did you do?

A I talked with Mr. Woodson and in the end we obtained a warrant for Mr. Cruse for possession of a firearm.

Q Did you have any basis or any evidence whatsoever to arrest Mr. Cruse at that time for anything that had happened at the Keller residence?

A No.

Q Was Mr. Cruse incarcerated as a result of [86] that arrest?

A Yes, he was.

Q Now, Officer Meinhard, calling your attention to March 15th, did you have occasion to respond to – Where was Michael Williams at that time, on March 15th?

A Mr. Williams was in Piedmont Regional Jail.

Q Did you have occasion to respond there?

A Yes.

Q And what was your purpose in going there?

A Agent Tyree and myself had drafted affidavits for search warrants for a PERK kit and we picked Mr. Cruse up after serving a copy on him at the regional jail. We took him to the hospital where we obtained approximately twenty-five head hairs, twenty-five pubic hairs –

Q Would you speak up, sir?

A – approximately twenty-five head hairs, twenty-five pubic hairs, two vials of blood and two saliva swabs from the mouth and two from the lips.

Q When you say PERK kits, what does PERK stand for? I don't think the ladies and gentlemen of the Jury understand that. Do you want me to tell you?

A Yes.

Q Physical Evidence Recovery Kit.

[87] A That's it.

Q And, essentially, what was the purpose in your getting that material?

A It was to compare with what was left at the scene or with the victims.

Q Recovering all those items from both Mr. Cruse and Mr. Williams, what did you do with those items that you recovered from them?

A The nurse initialled them at the hospital and turned them over to me. I took them and put them in the back of Agent Tyree's trunk and locked them up until we got back to the office where they were put in the evidence room in a refrigerator and evidence tape was put around the refrigerator door. He and I both initialled it.

Q Where were they taken from there?

A On the 17th of March they were taken out of the refrigerator and put back in the trunk of his car and we took them to the lab in Richmond.

Q This material here, I'm going to ask you if you can identify this, please.

A Yes.

Q What's involved in that?

A That is the Physical Evidence Recovery Kit of Michael Wayne Williams.

MR. VON SCRUCH: Judge, I would offer that [88] at this time as *Commonwealth's Exhibit Number Two.*

THE COURT: Now, this is your Exhibit Number Two, not for identification?

MR. VON SCHUCH: Right; yes, sir.

BY MR. VON SCHUCH: (Continuing)

A I'm going to show you this, Officer Meinhard, and ask you if you can identify that.

A Yes. This is the one on Jeffrey Alan Cruse.

MR. VON SCHUCH: Judge, I would offer that at this time as *Commonwealth's Exhibit Number Three.*

THE COURT: So entered.

BY MR. VON SCHUCH: (Continuing)

Q Mr. Meinhard, at the time that you locked Mr. Cruse up Monday night on a misdemeanor, I presume, weapons charge –

A Yes.

Q – was there any evidence that you were aware of that linked him to the Kellers that you could have charged him or obtained warrants for anything that occurred at the Keller residence?

A Not at that time, no.

[89] Q Did Mr. Cruse have occasion to talk to you and Officer Tyree after he was locked up on that weapons charge?

A He talked to Officer Tyree.

Q Were you present during that or not?

A No, I wasn't.

MR. VON SCHUCH: Would you answer any question, that Mr. Ford has, please?

THE WITNESS: Yes, sir.

MR. FORD: No questions for Deputy Meinhard.

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR
THE COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

* * *

[120] The witness, JEFFREY ALAN CRUSE, having first been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Mr. Cruse, can you speak up, please, so that everybody on the Jury can hear you, and give them your full name, please?

A Jeffrey Alan Cruse.

Q Speak up; talk to me.

A Jeffrey Alan Cruse.

Q Mr. Cruse, where are you from originally?

A Originally, Indiana.

Q Where had you been living prior to the time you came to Cumberland County?

A At the Lozanos.

Q I mean prior.

A Oh, prior?

Q Before you came to Cumberland, where were you living?

A Fairfax.

Q Was there a reason why you came to Cumberland?

A For work.

[121] Q Can you tell us how it was that you managed to come down here to work?

A Like –

Q In other words, who did you know and how were arrangements made? Why did you come down here to find a job?

A I knew the Lozanos and he got me a job where he was working.

Q Where was that?

A With Donald Short.

Q Do you remember when it was, approximately when it was that you first came to Cumberland County to stay?

A Between the 8th and probably the 11th, or something like that.

Q Of when?

A January.

Q Of 1993?

A Yeah.

Q Had you ever lived in Cumberland County before that?

A No.

Q I'm not asking for a specific time. Do you remember approximately when it was when you first met the defendant, Michael Williams?

[122] A Maybe in the middle of January sometime.

Q Can you indicate the relationship that you established with him at that time?

A Just like drinking buddies.

Q Now, I'm going to show you an item – if the Court would let the Sheriff show him Commonwealth's Exhibit Number One, please. Mr. Cruse, before the evening of February 27th,had you ever seen that weapon?

A Yes, I had.

Q And where did you first see it?

A I think in Albert Lozano's car.

Q Whose weapon was that?

A It was Michael Williams'.

Q On the evening of the 27th, did you have occasion to have possession of that weapon?

A Yes.

Can you tell the ladies and gentlemen of the Jury what you and Michael Williams were doing on the evening of the 27th before you left the house?

A We was at the bar drinking.

Q Do you remember what bar that was?

A I can't remember the name of it.

Q Where did you go when you left the bar?

A To the Lozanos.

Q What did you do at the Lozanos?

[123] A Just like stayed there a little while and then tried to find a ride.

Q What, if anything, were you and Michael Williams going to do?

A Go rob a store.

Q You were going to go rob a store?

A (Witness indicates affirmatively.)

Q Did you have occasion to discuss that with Michael Williams?

A Not really.

Q Well, how did that plan come in to being; who thought of it?

A Mike.

What was said?

A Mike just asked me if I wanted to rob a store.

Q Did you have any idea what store you all were going to rob?

A No, I didn't.

Q Did you have any idea how you all were going to get there?

A No, I didn't, not at the time.

Q Do you know Verena James?

A Yes, I do.

Q Did you and Michael leave with her that [124] night?

A Yes, we did.

Q Can you tell the ladies and gentlemen of the Jury, did you have that weapon with you when you left, the .357?

A Yes, I did.

Q Your answer would be yes?

A Yeah.

Q At that time, did Michael Williams have a weapon with him?

A No, he didn't.

Q Do you know where Verena James dropped you off, you and Michael Williams?

A Some road right up before the store.

Q What happened after you got out of the car?

A We like walked through the woods towards the store.

Q When you got to the store, did you rob the store?

A No, we didn't.

Q Why didn't you and Michael Williams rob the store?

A It was like closing at the tine or something like that.

Q What did Michael Williams say at that time?

[125] A That he knew a house where we can go; they'd have a couple thousand dollars.

Q Had you ever met or did you know Morris or Mary Elizabeth Keller before this evening?

A No, I hadn't.

Q Did you know where they lived?

A No, I did not.

Q Had you ever been to their house before under any circumstances that you can recall?

A No, I had not.

Q Now, do you know approximately – This was after dark, I presume; is that correct?

A Yeah.

Q Who took you to the Kellers?

A We walked.

Q Who led you as you walked?

A We was just walking together.

Q Who knew where they were going?

A Mike did.

Q Now, can you tell the ladies and gentlemen of the Jury what happened when you got to the – Well, let me

ask you this. When you were in the vehicle with Verena James, at some point in time did you go to Mike's house first before she dropped you out at the store?

A Yes, we did.

[126] Q Did you have the weapon at that point?

A Yes, I did.

Q What did you do with the weapon when you were in the vehicle with her?

A I just had it in my pants, in the front.

Do you recall whether or not you showed her that weapon?

A Yes, I did.

Q Why would you do that?

A I don't know.

Q Prior to the time you went in, what happened outside the Keller residence prior to you going in?

A We looked at the house for a little while and Mike had the gun at that point.

Q I need to hear you. I can't hear you.

A We just like stayed on the other side of the Jeep and like looked at the house for a while.

Q Did you all have any conversation?

A I can't remember.

Q How did you get into the house?

A Walked in.

Q Did you have the weapon at this time?

A No, I did not.

Q Where was the weapon?

A Mike had it.

[127] Q How did Mike get the weapon?

A I handed it to him, I think, right by the Jeep.

Q What was the plan to get into the Keller residence?

A I was supposed to knock on the door and then I just walked in.

Q You were supposed to – You were going to knock on the door and then what was going to happen? You all were just going to go in?

A I don't really know. That's what I did. Once he answered the door, I just walked in.

Q Who answered the door?

A Mr. Keller.

Q Were you the first one in the house?

A Yes, I was.

Q What did you say to Mr. Keller when you knocked on the door?

A Nothing. I just walked in.

Q You knocked on the door and he opened the door and you walked in?

A Yes.

Q Where was Michael Williams?

A Behind me.

Q Did he enter the house behind you?

[128] A Yes, he did.

Q Did you see what he did when he entered the house?

A He said he had the gun pointing at him.

Q He had the gun pointed at Mr. Keller?

A Yeah, at his head.

Q Did Mr. Keller say anything to you at this time?

A I don't think so.

Q When you went into the house, as you and Mr. Williams entered the house, could you see or did you see Mrs. Keller?

A Yes.

Q Where was she?

A She was in the kitchen.

Q Now what happened when you and Michael Williams, with the .357, got in the house; what was the next thing that you two did?

A We had them go in the kitchen and then I looked in her purse for money.

Q You looked in Mrs. Keller's purse. Did you find any money?

A Six dollars.

Q What did you do with it?

A Put it in my pocket.

[129] Q What was Michael Williams doing during the time you were looking around the house?

A He was standing there with the Kellers.

Q Did he still have the .357?

A Yes, he did.

Q Could you hear any conversation between the defendant and the Kellers?

A I don't remember.

Q What were you doing while he was in the kitchen with the Kellers and the gun?

A I was looking through the rest of the house.

Q Can you indicate what you found?

A I found some like fake jewelry and some shells in the bedroom.

Q In the bedroom?

A Yes.

Q What did you do with the jewelry that you found in the bedroom?

A I stuck it in my coat pocket.

Q You said you found some shells?

A Yes.

Q What do you mean by that?

A Some shells for a .38.

Q What did you do with them?

A I put them in my coat pocket.

[130] Q Do you remember how many there were?

A Not really.

Q What did you do after you found the shells for the .38?

A I just like told them I found some shells and I asked them where the gun was.

Q What happened at that point?

A I heard Mr. Keller say it was up on top of the dresser.

Q Did you go back to the dresser?

A I was still in the bedroom.

Q What did you do?

A I looked up on top of the dresser and it was laying up on top.

Q You found the .38?

A Yeah.

Q Now, did you continue after you found the .38 to look around the house for other property?

A Yes, I did.

Q Can you indicate what you found, what were some of the other things you noticed or found and what you did?

A Not really. I looked like in the back living room. It wasn't nothing in there. Other than that, it was just like a T.V. and stuff out in the front room.

[131] Q I need you to speak up. The whole time you were looking around the house and finding these items, where was Michael Williams and where were the Kellers?

A In the kitchen.

Q Now, did there ever come a point in time where Mr. Keller and Mrs. Keller were moved from the kitchen?

A Later on.

Q Was there a point in time as you were looking around that Michael Williams came out of the kitchen?

A After they was in the closet.

Q Well, maybe you can tell me, because where we've left you, as I understand, is that you were looking around the house for things to steal and Michael Williams was in the kitchen with them?

A Yeah.

Q Now you've indicated that they were in the closet?

A Yeah, when I went back to the kitchen.

Q Tell us how that happened.

A I just went back to the kitchen and Mike said, "We're going to tie them up." So I grabbed like a phone cord and tied them up with that.

Q Were the Kellers placed at that point?

[132] A In a closet inside the living room, the front living room.

Q Now, what was the next thing that you and Michael Williams did in that house?

A We looked through it.

Q What were you doing, what were you looking for, what did you take?

A Like money; we was looking for money.

Q Did you find any additional money?

A Not just some change later on.

Q Did you see whether or not Michael Williams found any money?

A No, I did not.

Q Where were some of the other things that you saw and what did you do when you were looking around?

A Just like looking around and Mike found a leather jacket inside the closet.

Q He found a leather jacket inside the closet, Mr. Keller's jacket?

A I don't know whose jacket.

Q What did he do when he found the jacket?

A Put it on.

Q Was he wearing any kind of jacket or anything when he went to the house?

A Like a jean jacket.

[133] Q What did he do with that when he put on the jacket he found in the closet?

A I'm not sure. I think he laid it down somewhere.

Q Did you ever see that jacket again?

A When I threw it out of the Jeep.

Q You threw it out of the Jeep?

A Yeah.

Q Why did you do that?

A Mike just said throw it out.

Q Michael said throw it out?

A Yeah.

Q I'm going to ask you if you can identify that; do you recognize that?

A I believe I do.

Q Can you speak up and tell us –

A I believe I do.

Q – is that the jacket that he was wearing –

A I think so.

Q – that was found in the closet by Michael Williams?

A Yeah.

MR. VON SCHUCH: Judge, at this time I would offer that as Commonwealth's Exhibit, I believe – No, I don't believe because I think I've lost [134] track.

THE COURT: *Commonwealth's Eleven.*

MR. VON SCHUCH: Yes, sir.

BY MR. VON SCHUCH: (Continuing)

Q At this point, after Michael Williams took the jacket out of the closet and put it on, what was the next thing that you two did in the house?

A I think just looked around some more.

Q Just continued to look around?

A (Witness indicates affirmatively.)

Q Were you collecting any property at this time?

A I wasn't, I don't think.

Q You don't think so. Was anything taken out of the house at this time and put in the Jeep outside or anything like that?

A I think just like a little bit later we put like the smaller stuff in it.

Q When you refer to smaller stuff, what type of things are you referring to?

A Like the rifles and stuff we found in the closet.

Q I'm going to show you two rifles that officer Tyree has shown the Jury. Do you recognize those?

[135] A Yes, I do.

Q Where were they found; where did you find them?

A Inside the closet.

Q And what was done with them at that time?

A I laid them up on the couch.

Q You laid them on the couch?

A Yeah.

Q Was there a reason at that time, when you were looking around, that you opened that particular closet?

A That's just where Mike said to put them after we tied them up.

Were there any other items at this time that you took out to the Jeep outside?

A Just like rifles and a shotgun and like an old level.

Q An old level?

A Yeah.

Q When you say shotgun, I'll show you this. Indicate whether or not you recognize that.

A Yes, I do.

Q Does that appear to be the shotgun?

A Yes.

Q And this was also placed in the Jeep, as I [136] understand you, at this time?

A (Witness indicates affirmatively.)

THE COURT: It's *Commonwealth's Exhibit Twelve.*

BY MR. VON SCHUCH: (Continuing)

Q Now, at this time after these things were loaded in the Jeep, what happened then in the house?

A I'm not really sure.

Q I need you to speak up.

A I'm not really sure.

Q Well, where were the Kellers?

A I think they were still in the closet.

Q Was there a point in time when they were moved? When you were in the house gathering up property and moving it to the Jeep, were the moved from that closet at any time?

A Yes, she was.

Q Where was Mrs. Keller moved to?

A To the back bedroom.

Q Why was she moved back there?

A I didn't know at that time.

Q Who moved her to the back bedroom?

A I think I did.

Q You did?

[137] A Yeah.

Q Did you have the .38?

A Yes, I did.

Q Why did you move her to the back bedroom?

A I'm not really sure.

Q Where did you put her in the back bedroom?

A In the closet.

Q So they were separated?

A Yeah.

Q After Mrs. Keller was put in the closet, what did you and Michael Williams do?

A I forget.

Q Did you find any other property?

A Just like the T.V. and stuff like that in the living room.

Q At this time was that stuff removed to the Jeep or was that left in the house?

A That was later on.

Q It was removed later on?

A Yes.

Q Was it moved in the house? Did you move it from where it was to a different location or did you leave it where it was? Was any other property –

A I think we left it where it was.

You left it where it was, all right. Now, [138] did there come a point in time or can you tell us what happened with Mrs. Keller?

A We had intercourse with her.

Q Well, if you can speak up to me. Did Michael Williams say anything to you about intercourse with Mrs. Keller?

A He asked me if I wanted to have sex with her.

Q He asked you if you wanted to have sex with her. What did you say?

A "I don't know. I guess."

Q Well, I want to know what you said.

A That's what I said.

Q You don't know?

A I said, "I don't know. I guess."

Q What did Michael –

THE COURT: He said, "I don't know. I guess."

BY MR. VON SCHUCH: (Continuing)

Q "I don't know. I guess." I'm sorry. What did Michael Williams do at that point or say?

A I don't remember.

Q Was Mrs. Keller moved from the closet?

A Yes, she was.

[139] Q Who moved her from the closet?

A I untied her.

Q You untied her?

A Right.

Q Where was she taken when she was untied?

A She, like, went over to the bed.

Q She went over to the bed? Were you in the room with her?

A I think I was like right by the doorway at that time.

Q After you untied her, did someone move her to the bed?

A No. She walked over there.

Q She walked over. Why did she walk to the bed?

A I forget why. I don't know.

Q Was she clothed or unclothed at this time?

A She was still unclothed.

Q You said she was still unclothed. At what point in time were her clothes removed?

A Like sometime in the kitchen right after we went in.

Q Who was it that told them to take their clothes off?

A Mike did.

[140] Q Mike did?

A (Witness indicates affirmatively.)

Q So that at the time they were put into the closets, they were both unclothed, both of them?

A Yes, sir.

Q When she moved to the bed, what happened?

A Mike had sex with her.

Q Mike had sex with her? What was Mrs. Keller saying at this time; could you hear?

A I don't remember.

Q What weapon did Mike have with him?

A He had the .357 with him at that time.

Q You were at the door; is that correct?

A Yeah.

Q What did you see Michael Williams do to Mrs. Keller?

A He started having sex with her and I just walked out.

Q When you say having sex, what do you mean?

A He stuck his penis in her vagina.

Q Did you watch him have sex with her after that; did you watch him have –

A No. I walked out into the living room.

Q Do you know how long Michael Williams was in the bedroom with her?

[141] A No, I don't.

Q Did you hear any conversation between them?

A I don't think so.

Q What happened at that point? Did you go back in the bedroom?

A A little bit later I did.

Q Was Michael Williams still in the bedroom with her?

A He was like walking out as I was walking in.

Q What happened as you walked back into the bedroom and Michael Williams walked out?

A He asked for the .38.

Q Did you give it to him?

A Yes, I did.

Q Did you know why he asked for the .38?

A No.

Q Did he tell you why he wanted the .38?

A No, he didn't.

Q Was the .38 loaded?

A It was fully loaded.

Q Fully loaded. How many bullets were in the .357?

A Two.

Q When you gave him the .38, what did he do with the .357?

[142] A Handed it to me.

Q He handed it to you? You then went in the bedroom with the .357; is that correct?

A Yes.

Q And what did you do to Mrs. Keller at that time?

A I had intercourse with her.

Q When you say you had intercourse –

A I stuck my penis in her vagina.

Q What was Mrs. Keller saying to you at that time?

A "Just don't hurt us."

MR. FORD: Objection, Judge. I don't see what that relevance – I think it's hearsay, number one, what Mrs. Keller had to say to this man right here, and I don't think it falls under any exceptions to hearsay rule.

MR. VON SCHUCH: Well, I think it does, Judge. I think if Mrs. Keller is pleading with him not to have sex with her that certainly the burden is on the Commonwealth that it was non-consentual sex. The fact that she is pleading with him –

THE COURT: I mean, I think that is admissible for that reason.

[143] BY MR. VON SCHUCH: (Continuing)

Q Mrs. Keller was pleading what, "Don't hurt us"?

A "Just don't hurt us."

Q When you got done having sex with Mrs. Keller, what did you do at that point?

A I'm not sure. I think we tied them back up and walked them into the living room, tied her back up or something.

Q Were they clothed at that time?

A No, they wasn't.

Q Did you and Michael Williams do anything else while they were in the living room, tied up?

A I don't think so.

Q Where was the next place you moved them to?

A Into the shower.

Q And whose idea was it to do that?

A Mike's.

Q What did he tell them to do?

A He just told them to take a shower.

Q Both Mr. and Mrs. Keller?

A Yes.

Q Did you know why he was doing that? Did he tell you why he was doing that?

A No.

[144] Q After they took a shower, what did he tell them to do?

A Put on clean clothes.

Q Did they do that?

A Yes, they did.

Q At the time they were dressed after the shower, where were they in the house? Where did you take them in the house?

A Back into the kitchen.

Q What happened when you got back in the kitchen?

A I can't remember.

Q At this time did you still have the .357?

A Yes, I did.

Q Did Michael Williams still have the .38?

A Yes, he did.

Q Were they at any time removed from the house?

A Yes, they was.

Q How did that happen?

A Mike said, "We're going to take a walk."

Q Mike said, "We're going to take a walk"? Where were the Kellers taken?

A Back on a dirt road and into a thicket.

Q When they left the house, who was the first [145] one out of the door?

A The Kellers. I can't remember exactly which one.

Q Did Mrs. Keller ask to take anything before she was led out of the house?

A She asked for her marriage license.

Q She asked to receive her marriage license?

A (witness indicates affirmatively.)

Q Was she permitted to get that?

A Yes, she was.

Q Where did she go to get her marriage license?

A I think it was by the door on a table right there, like a dresser or something, some kind of little thing.

Q What were the Kellers saying and doing at this point?

A I can't remember. I don't think nothing.

Q You don't think they were saying anything?

A No.

Q When Michael Williams told them, "Let's take a walk," did they say anything to that?

MR. FORD: Judge, again, I don't know what – again, a hearsay objection as to what the Kellers may or may not have said during this [146] period of time. I don't think it falls, again, under any hearsay exceptions. What they tell him is clearly a hearsay situation.

THE COURT: It depends on what they're telling. It depends on –

MR. VON SCHUCH: This is a part of the crime. This is a part of the res gestae. These aren't hearsay admissions to prove the truth of this. This is what they were saying and that's what I'm trying to establish, is what their condition was.

MR. FORD: What they said doesn't prove murder. It doesn't prove –

MR. VON SCHUCH: Well, it proves abduction, which – They didn't willfully accompany them.

THE COURT: Whether they were willfully accompanying somebody or whether they were being forced.

MR. FORD: Well, I think his evidence is that they were going out by gunpoint. I think that's enough. What they say, in my view, is irrelevant and hearsay, clearly, and probably prejudicial and inflammatory, depending on what they say.

MR. VON SCHUCH: Judge, I'll just withdraw [147] the question.

THE COURT: Withdraw the question? If he's withdrawing the question –

MR. FORD: I understand, Judge.

BY MR. VON SCHUCH: (Continuing)

Q Mr. Cruse, you indicated that the Kellers were the first to leave the house; is that correct?

A Yes, they was.

Q And Mrs. Keller was leaving, as I understand your testimony, with her marriage license in her hand?

A Yes.

Q Where were they taken?

A Down a dirt road and into a thicket.

Q Do you know how far they were from the house?

A Not really.

Q They were the first ones out the door; is that correct?

A Correct.

Q Who was the first one to walk down the dirt road?

A The Kellers was.

Q Where was Michael Williams?

A Behind the Kellers.

[148] Q Did he still have the .38?

A Yes, he did.

Q And where were you?

A I was behind Mike about, you know, quite a ways behind.

Q Did you still have the .357?

A Yes, I did.

Q When they got back into the woods, who was the first to enter the wooded area off the dirt road?

A The Kellers.

Q Do you recall whether Mrs. Keller or Mr. Keller were the first ones to try and get through that wooded area?

A No. I don't know which one went first. It was the Kellers though.

Q Was there a point in location where they stopped in the woods?

A Yes, on back a little ways.

Q Now, did you enter the wood thicket with your .357?

A Yes, I did.

Q Did Michael Williams enter it with his .38?

A Yes, he did.

Q As you were in the woods, where was Michael Williams standing in relationship to you?

[149] A To my left.

Q So if I'm you, Michael Williams was over here; is that correct?

A Yes.

Q 'Now, where was Mrs. Keller at this time?

A Directly in front of me.

Q So if I'm you then Mr. Woodson here would be the direction or the location of Mrs. Keller; is that correct?

A Correct.

Q Was she this close to you or was she farther away?

A She was further.

Q Can you give us some idea, if I'm you, where you believe she was standing in terms of, perhaps, something; Mr. Woodson, this table, the end of the table, or whatever?

A Maybe around this end of the table somewhere.

Q At the other end of the table?

A Somewhere in there.

MR. VON SCHUCH: Let the record reflect five or six feet.

MR. FORD: That's fine.

[150] BY MR. VON SCHUCH: (Continuing)

Q Now, Mr. Williams was on your left; is that correct?

A Correct.

Q Where was Mr. Keller?

A Directly in front of him.

Q Was he the same distance from Mr. Williams that you were from Mrs. Keller?

A Yes, he was.

Q And would that place him somewhere – and I'm pointing to an area in front of a file here on the table; is that correct?

A Yeah.

Q What was the plan at this point?

A I still didn't know at that point.

Q You didn't know at that point. What discussions did you and Michael Williams have?

A I really don't remember exactly.

Q Did there come a point in time when you raised the .357 towards Mrs. Keller?

A Yes, there was.

Q And is there a reason why you did that?

A Mike said, "We'll shoot at the count of three."

Q So Michael Williams said, "We're both going [151] to shoot at the count of three"?

A Yes, he did.

Q Did you agree to that?

A I didn't think he was going to do it.

Q Who fired their weapon first?

A Mike did, but it was after that.

Q Michael Williams fired his weapon and who did he shoot?

A He shot Mr. Keller.

Q What happened to Mr. Keller?

A He fell down.

Q When he shot Mr. Keller, what did you do?

A I just like looked at him.

Q And then what did you do?

A Then he told me to shoot, that he didn't want to leave no witnesses.

Q And what did you do?

A I shot.

Q You shot Mrs. Keller?

A (Witness indicates affirmatively.)

Q What happened to Mrs. Keller?

A She fell down.

Q Now, did Mr. Keller stay on the ground at this point?

A No. He stood back up.

[152] Q And what happened when he stood back up?

A Mike like jerked back just a little bit and shot him again.

Q He jerked back?

A Like surprised.

Q If he was standing here next to you at this time when he jerked back, were you somewhat in front of him?

A No. It was just like maybe an inch or so.

Q It was just an inch or so?

A You know, just like jerked.

Q When he jerked back, what did he do at that time?

A He shot him again.

Q And what did Mr. Keller do at that time?

A He fell down.

Q Now, you had how many bullets in the .357 at this time?

A Two.

Q After you shot Mrs. Keller, how many did you have?

A One after that.

Q Did you shoot that one bullet?

A No, I did not.

Q Why didn't you shoot that one bullet?

[153] A Because Mike said if anything happened, just shoot one time. He didn't want to shoot both bullets.

Q If anything happened, just shoot one time. Why did he want one bullet left in the .357?

A I don't know.

Q When did he tell you that?

A I forget when. I remember him telling me, but I don't remember exactly when.

Q Well, was it before you went into the house, was it after you left the house, was it when you were in the woods?

A I think it might've been like over by the store.

Q Over by the store when you only had one gun?

A Yeah.

Q He only wanted you to shoot once?

A (Witness indicates affirmatively.)

Q Had you all planned to shoot someone in the store?

A Not really, no.

Q After Mr. Keller was shot the second time by Michael Williams, what did you do?

A I just looked at them.

Q You just looked at Mr. and Mrs. Keller and they were both on the ground?

[154] A Yes, they was.

Q What was the next thing that happened?

A I was starting to walk off and Mike said, "Wait." He said, "What if they ain't dead?" I said, "I don't know."

Q You started to walk off? If Michael Williams is standing here and I'm you, where am I?

A Oh, okay, it's way back there.

Q This is Michael Williams here.

A Okay.

Q Are you behind him; are you off to this side of him?

A I'm behind him.

Q I'm sorry?

A I'm like walking back up through the thicket we come in.

Q You're walking back up through the thicket. How far were you from Michael Williams when he made the statement to you, "What if they're not dead?"

A About four foot.

Q About four feet. So you were out here somewhere?

A Yeah. It wasn't too far from him.

Q What did you say when Michael Williams said, "What if they aren't dead?"

[155] A I said, "I don't know."

Q What did Michael Williams do at that point?

A He shot them again.

Q He shot them both again? Do you know how many times he shot them?

A I think like a couple more times apiece or something like that.

Q Did you fire that .357 again?

A No, I did not.

Q Did you see him shoot Mrs. Keller with the .38?

A His back was like towards me, but you could tell by the way he was leaning that he was like leaning towards her.

Q So if he shot her, she would be shot with both the .38 and the .357?

A Yeah.

Q Mr. Keller was never shot with the .357?

A Not he was not.

Q What happened when you and Michael Williams got out to the road?

A He handed me the .38 to reload and I handed him the –

Q Why did he give you the .38 at that time?

A To reload it.

[156] Q You had the shells?

A Yes. I had them in my pocket from where I took –

Q Did you reload the .38 at that time?

A Yes, I did.

Q What did you do with the shells that you took out of there?

A I just like put them in my left hand and flung them off to the left.

Q Off the road?

A Yeah, directly like across from where we come out of the thicket.

Q Did you give the .38 back to Michael Williams?

A No. I handed him the .357 while I reloaded.

Q Did he thereafter keep the .357 and you keep the .38?

A Yes, I did.

Q Is that what weapons you had as you went back to the house?

A Yes, it was.

Q Let me ask you this, to back up. When you were out there with the Kellers in the woods and they were being shot, did you have occasion to – was there someone else out there, an animal out there?

[157] A There was a dog.

Q A dog out there?

MR. FORD: Judge. I'll renew my objection that I made before the trial started as to the dog and the evidence of the dog. I think it's irrelevant and inflammatory.

THE COURT: Overruled.

BY MR. VON SCHUCH: (Continuing)

Q Had you seen that dog in the house before?

A Yes, it was. It was like in the pantry there in the kitchen.

Q And what happened to the dog out in the woods?

A I thought Mike shot it. He like leaned down towards the dog and shot.

Q When you walked back up to the house, what did you have occasion to see?

A When we went back in the house?

Q Yes.

A The dog was sitting in the hallway.

Q What reaction did you and Michael Williams have to that?

A It just freaked us out.

Q Now, when you got back to the house, what [158] did you and Mr. Williams do at that point?

A I think we loaded up the bigger stuff, like the T.V.

Q When you say the bigger stuff, you said a T.V.?

A T.V. and microwave and stereo.

Q Microwave? Let me show you this. Does this look familiar? Have you seen this? Is that the microwave?

A Yes, it is.

Q A T.V. What else was loaded in there?

A A stereo and some speakers.

Q Where were those items taken when they were taken out of the house?

A In the back of the Jeep.

Q In the back of the Jeep, all right. And after all the items were taken out of the house, what did you do and what did Michael Williams do at that time in the house?

A He wanted to burn the house.

Q What did you do and what did he do?

A I grabbed some lamp fuel and poured some like on the back bed and the back living room and in the hallway.

Q You poured some on the back bed; is that correct?

[159] A Yeah.

Q Is that the same bed –

A Yes, it was.

Q – where you and Michael Williams had raped Mrs. Keller?

A Yes, it was.

Q After you poured that, what did you do; did you light it?

A I lit it.

Q Did Michael Williams light a fire in there?

A He like started one on the couch in the front room.

Q He started one in the front room? Did you leave the house at that time?

A After the fire was going.

Q Now, what did you take with you as you left the house? What did you leave the house in? You walked there. How did you leave?

A The Jeep.

Q Was that the Jeep that was parked out in front of the Kellers?

A Yes, it was.

Q When you left the house, where did you go?

A We was heading to Fredericksburg.

Q How did you get there? Where did you go? [160] Which way did you leave Cumberland County, do you know?

A I don't really know. I think we took 60 and went into Richmond.

Q You went into Richmond? Did you get lost in Richmond?

A Yeah.

Q Who was driving?

A Michael was.

Q What weapon did you have at this time?

A I had the .38.

Q And what did he have?

A The .357.

Q What happened when you got lost in Richmond?

A We walked into a bar first and then I asked for directions and then we walked out, and while we was walking back to the Jeep, there was a cop at a stoplight.

Q A police officer at a stoplight?

A Yeah.

Q Did you all ask him for instructions?

A Mike did.

Q Mike stopped with a Jeep full of stolen property and walked up to a police officer or drove up to a police officer and asked him for directions?

A Yeah. Well, we was walking back towards the Jeep when he stopped there, when he seen him.

[161] Q And did he give you directions?

A Yeah, to get to 95.

Q When you got to 95 where did you go?

A To Fredericksburg.

Q Now, why did you all go to Fredericksburg?

A I knew some people there.

Q What were you going to do when you got there?

A Sell the stuff.

Q So this was how you were going to get money?

A (Witness indicates affirmatively.)

Q You only got how much, six dollars, out of her purse, Mrs. Keller's purse?

A Yes.

Q And you don't know whether or not Michael Williams received any money or found any money when he was looking around?

A No. I seen Mr. Keller's wallet up on the counter, but it was empty.

Q Where did you go when you got to Fredericksburg?

A First, we went to Don Jett's.

Q Who is Donnie Jett?

A A friend of mine.

Q He was a friend of yours. Was it still dark [162] or was it light when you got there; do you recall?

A It was dark.

Q Was he there?

A No, he was not.

Q Did you wait for him?

A Yes, we did.

Q Did he ever show up?

A About –

Q I mean, that morning.

A Yeah, in the morning.

Q What time did he show up?

A I'm not sure; maybe around 6:00 or 7:00. It was just getting daylight.

Q Did you sell him any property at that time?

A A T.V. Well, later on, not at that point.

Q At that time?

A No.

Q When you first stopped, did you sell him any at that time?

A No.

Q Where did you go then after you left Mr. Jett's?

A We went by Dave Sine's.

Dave Sine?

A Yeah.

[163] Q Do you know Dave Sine?

A Yes, I do.

Q Was he a friend of yours, too?

A Yes, he was.

Q Do you know what time it was you arrived at the Sines?

A Around 10:00 or 10:30 or 11:00.

Q You think that's when you arrived. Do you know how long you stayed there?

A I'm not sure. We ate lunch.

Q You ate lunch there; they fed you?

A Yeah.

Q Did you sell them any property?

A A VCR.

Q Who bought the VCR; Mr. and Mrs. –

A Oh, that was in the house.

Q I'm sorry. Did you sell Mr. Sine any property?

A Oh, yes.

Q What did you sell him?

A A VCR.

Q Did you sell Mrs. Sine any property that you are aware of, that you recall?

A I don't think so.

Q Did they have children?

[164] A Yes, they do.

Q Was anything given to the children by either you or Michael Williams?

A I gave them like a bunch of fake jewelry.

Q When you left the Sines, who was the next individuals that you – Do you know how much you got from the Sines?

A I think twenty dollars or something like that.

Q Twenty dollars, you think? Where did you go after that?

A I think we went back to Don Jett.

Q Do you know a Tammy Tolley and Donald Ramey?

A Yes, I do,

Q Did you see them before you went back to Jett's or after you left Jett's?

A After we left Jett's house. We was going over to another friend's house and we passed him coming back out from his house.

Q Donald Ramey?

A Yeah.

Q Did Tammy Tolley, did she buy any property that you had in the truck?

A I'm not sure. I can't remember.

[165] Q Did Mr. Ramey buy any property, that you can recall?

A A stereo and, I think, speakers.

Q He bought a stereo. Do you know how much he paid for the stereo?

A I forget.

Q Were both you and Michael selling this property out of the Jeep?

A Yeah. I was like sitting up in front.

Q Now, after you ran into the Rameys, did, you go back to see Donnie Jett or did you go down to the river after that?

A I think we went down to the river.

Q At what point in time did Mr. Jett buy a T.V.?

A When we went back over there before we met Ramey.

Q Do you know how much he paid for the T.V.?

A I can't remember; maybe forty or fifty dollars, something like that.

Q Who was holding the money?

A Mike took half and handed half to me.

Q You then went down to the river; is that correct?

A Correct.

[166] Q How did you get down there?

A Drove.

Q Did you still have a weapon with you at this point?

A The .38.

Q When you went down to the river, did you have a weapon with you?

A I had a .38 with me.

Q What did Michael Williams have?

A The .357.

Q Are you sure about that?

MR. FORD: Objection, a leading question.

THE WITNESS: I believe so.

THE COURT: Sustained.

BY MR. VON SCHUCH: (Continuing.)

Q When you got down to the river, what did you do with the Jeep? Let me ask you this. Did you have any property left in the Jeep that you hadn't sold?

A A microwave, some rifles, and a level.

Q What did you do with that property?

A We threw it in the river.

Q There was a microwave you threw in the river?

A Right.

[167] Q Did you have any rifles left?

A Two.

Q Two rifles? Would they be the carbine loading rifles?

A Yeah.

Q Were they thrown in the river?

A Yes, they was.

Q What about the .357?

A It was thrown in there, also.

Q Who threw the .357 in the river?

A Mike Williams.

Q Did you reload that .357?

A Yes, I did.

Q The .357, you reloaded that. Do you know what type of ammunition you put in it?

A Yeah. It was .38 Special.

Q When you had shot Mrs. Keller, do you know what type of ammunition, what those two bullets were in the gun.

A I believe they was .357.

Q And you reloaded it with different ammunition; is that what you're saying?

A (Witness indicates affirmatively.)

Q So that when you threw –

THE COURT: Would you answer so it goes on [168] the record?

THE WITNESS: Yes.

BY MR. VON SCHUCH: (Continuing)

Q When you threw the .357 in the river, then it still had one .357 in it, at least one; is that right?

A Yes, sir.

Q After you threw the items in the river, what did you and Michael Williams do at that point?

A We went to like a pool hall place and drunk a beer and called a taxi to take us over to the bus stop.

Q And how did you get back to Richmond?

A Greyhound.

Q Do you know what day it was when you got back to Richmond or what time it was that you got back to Richmond?

A I can't remember.

Q Who came and picked you up?

A Mike's brother.

Q Now, you indicated that at the time you got to the river you had the .38?

A Correct.

Q And Michael Williams had the .357?

A Correct.

Q Is it my understanding that you said you [169] were the one that threw the .357 in the river?

A No. Michael did.

Q Michael threw the .357 in the river. what did you do with the .38?

A I handed it to Mike.

Q When you came back to Richmond, who had the .38?

A Mike did.

Q After you got back to Cumberland, did you go home?

A Yes, I did.

Q Did Michael Williams leave you?

A Yes, he did.

Q Who had the .38?

A Michael did.

Q Do you know what Michael Williams did with the .38?

A No, I do not.

Q When you came back to Richmond, were you supposed to be at work Monday?

A Yes, I was.

Q Did you go to work?

A No, I didn't.

Q Can you tell us, did there come a point in time when Officer Tyree and Meinhard got an occasion to [170] come by to talk to you?

A Yes, they did.

Q Did you go with them somewhere?

A Yes, I did.

Q Where did you go with them?

A Over here to the police,

Q To the Sheriff's office?

A Yes.

Q Did they take your boots?

A Yes, they did.

Q Let me show you those boots and see if those – Do you remember these?

A Yes, I do.

THE COURT: Are they your boots?

THE WITNESS: Yes.

BY MR. VON SCHUCH: (Continuing)

Q They were taken from you?

A Yes, they was.

Q Now, at the time that you talked to Officer Tyree and Meinhard were they asking you about the Kellers?

A I can't remember.

Q Did you tell them anything about the Kellers or anything that you and Michael Williams had done at that time?

[171] A No, I did not.

Q And you went home; is that correct?

A Correct.

Q Subsequently, if I understand it, what happened to you that evening?

A I was arrested.

Q And you were incarcerated?

A Yes, I was.

Q The next day, on March 2nd, did you have occasion to talk to Officer Tyree?

A I believe so.

Q Where was that?

A At Piedmont.

Q What did you tell Officer Tyree at that time?

THE COURT: Now, I'm not sure the Jury knows where Piedmont is.

BY MR. VON SCHUCH: (Continuing)

Q When you say Piedmont, what are you' referring to?

A Piedmont Regional Jail.

Q A jail. You were locked up on a misdemeanor firearms charge and Mr. Tyree came out there to talk to you; is that correct?

[172] A Yes, I was.

Q Did you have any attorney on the misdemeanor charge?

A No, I did not.

Q Did you have an attorney before you talked to Mr. Tyree?

A No, I did not.

Q Did you talk to Mr. Tyree at that time?

A No. I told him I wanted a lawyer.

Q You got a lawyer then; is that right?

A Correct.

Q Then you went back and you and your lawyer attempted to – Well, what did you and your lawyer do?

A He just asked me what happened.

Q Well, before you told anybody what happened, did you enter into any agreement with the Commonwealth?

MR. FORD: Again, Judge, it's his witness and the Court has to presume at this point in time that he is competent to testify. He's not been impeached at all. I think what Mr. Von Schuch is attempting to do is to bolster his witness before an attack by me on cross examination to impeach him. I think it may be proper, but it's

proper only on redirect. In other words, he's putting the cart before the [173] horse at this point in time.

MR. VON SCHUCH: I am entitled to –

THE COURT: He is entitled to ask his client what he did.

MR. FORD: He's asking him about whatever deal he may have had, I believe, as I understood the question.

THE COURT: I don't know whether he had any or not. I don't know what the answer to the question is.

MR. VON SCHUCH: That's correct. Judge, I'm entitled to ask this man – I mean, Mr. Ford stood up here and told the Jury in opening statement that there was going to be a dispute about who shot who. Now, obviously, that places this gentleman's credibility in question and, obviously, I think I would be entitled to ask him those questions to bring out the sequence of events as to when he talked, why he talked and so forth and so on, and I believe that's perfectly proper on cross examination where the witness of this issue, where his credibility is being challenged.

MR. FORD: What I said in opening statements is not evidence, and if Mr. Von Schuch thinks [174] that I impeached his witness on opening statement –

THE COURT: As I told you all, what you all say is not evidence.

MR. FORD: Yes, sir.

THE COURT: We know that and they know that.

MR. VON SCHUCH: I mean, I think the law in Virginia is pretty clear that I'm entitled to ask him these series of questions about whether or not he's testifying pursuant to promises or anything else. The Commonwealth is entitled to bring that, and has an obligation to bring that, before the Jury. To shut that off would keep exculpatory evidence from the defendant, it would prevent the Jury from knowing the whole story, and that's all I'm trying to do, is tell them exactly what happened so they can form their own opinion about this whole matter.

MR. FORD: I agree with his point, Judge, except that he's wrong procedurally. He's got the cart ahead of the horse. Right now he stands unimpeached and he presents him to the Court and to the Jury – I assume he presents him to the Court and the Jury as an unimpeachable witness at this point. Now, if I get him on cross [175] examination and I do a wonderful job and he becomes impeached, then I think that he's correct. He can come back in and ask him whatever be wants to, to try and rehabilitate his witness, but he's doing it now when there is no evidence of any cross examination or no evidence that he's been impeached.

MR. VON SCHUCH: I'm not trying to rehabilitate anybody at this point, Your Honor. I'm just trying to get from him the story as to what happened. The Commonwealth, as far as I understand the law in Virginia, is entitled to go through the sequence of events and to bring before the Jury, what, if any, promises were made to him and whether or not he's testifying pursuant to that. Now, I know of no law that prohibits me from doing that at this point.

THE COURT: Neither do I.

MR. FORD: At this point In time whether he has received a deal or not is not relevant evidence as to whether a murder was committed; it's not. And that doesn't go to prove that he shot Mr. and Mrs. Keller, or he shot Mr. and Mrs. Keller, or anything like that. That has nothing to do with that. All that has to do with [176] is his credibility and his credibility has not been placed in issue at this point in time.

THE COURT: I believe you understand on cross examination if you go beyond him asking about that, then he will be your witness.

MR. FORD: Well, I would object to that as limiting my cross examination unfairly. I understand –

MR. VON SCHUCH: That's the whole point, Judge, is that if I can't do it, how can he? I meant I think we get to that point, too.

MR. FORD: I'm not saying he can't do it, Judge. What I'm saying is that's doing it incorrectly. He's doing it before he's impeached.

THE COURT: He's merely asking him these questions and then you'll have your opportunity to cross examine him on any statement he makes.

MR. FORD: Well, I can get into it in front of the Jury if you want to do that or if you would like to take them out. I'd ask that you take them out at this point in time so that I can –

THE COURT: All right. I'm sure they'll be glad to stand up and walk anyway.

[177] (The Jury retired to the jury room.)

MR. FORD: Judge, what Mr. Von Schuch is attempting to do I don't – He's attempting to take the steam out of my cross examination. I agree with Mr. Von Schuch that on redirect he can rehabilitate his witness, but if he's attempting to do it now – I agree his credibility is going to be an issue, it certainly is, but at this point in time it's his witness on direct exam and there is a presumption that he is credible until he is impeached on cross examination. If I don't do a good job and he's not impeached, then he doesn't have to get to his bolstering evidence. If I do a wonderful job and he is impeached or he thinks that he may be impeached, then he can do that, what he is attempting to do right now. But what he is attempting to do right now is just take the steam out of my cross examination, trying to get before the Jury that he has made a couple of errors in some of the statements he's made and some of the deals that he's had, something I would certainly bring out before him on cross examination.

MR. VON SCHUCH: Judge, I don't limit [178] Mr. Ford's cross examination by one question. This gentleman is an eyewitness to this. He's a co-defendant and his credibility, by virtue of the fact that he is a co-defendant, is in issue. There are special instructions concerning the credibility of co-defendants in this matter. I would point out to the Court that the issues that I'm trying to bring out here are simply what he did and how he came to the point that he is here today before the Jury, and I think they are entitled to know that, not on cross examination but on direct examination. I'm not taking

any steam out of his cross examination. I don't control that one bit.

Mr. Woodson has already told the Jury about this witness, I believe, or told what he would say or some of what he would say in opening statement. I'm just simply trying to show the Jury how he got here today, and I believe I'm entitled to show that so that they have an opportunity to – If Mr. Ford stands down and doesn't ask him a single question, he can stand up on closing argument and argue that this man is not a credible witness. I am entitled to bring this to the Jury so that they have some [179] basis of judging that, whether he asks a single question or whether he doesn't ask a single question of this witness, and that's all I'm attempting to do. There is nothing here that deprives him of any right that he has. If he disapproves of it as a matter of trial tactics, this is not gamesmanship. This is the law.

MR. FORD: Number one, I resent being characterized as trying to play gamesmanship. That's the first thing. The second thing, I think, if Mr. Von Schuch –

MR. VON SCHUCH: Your Honor, I meant nothing personal by that or anything like that. I'm just pointing out that we're talking trial tactics, if that's what the argument is over.

THE COURT: I don't think it's any doubt this is trialmanships is what you all are arguing.

MR. FORD: In taking Mr. Von Schuch's example, if I were to sit down and not ask this man one question, then I do not think that I could properly argue to the Jury that he is an incredible witness because I have

not-asked him anything to put his credibility at issue. Mr. Von Schuch has called him as a direct witness [180] and at that point in time he is deemed to be credible unless on cross examination there is some bias discovery. If I put a hole in his story or if I make him look a little bad, that's fine.

THE COURT: You mean he can't ask this man what he did? He's just told more or less what he told the officer. He's told us that, what he told the officer. And you are contending that he doesn't have the right to say, "Why did you tell it to him?"

MR. FORD: Yes, sir. I don't think he has the right to basically impeach his witness. I mean, what he's getting his witness to say is, "I lied to the police officer." Doesn't that impeach him? Yes.

THE COURT: Is that what you're going to ask him?

MR. VON SCHUCH: That's not impeachment, Your Honor. I'm asking him about why he made the first statement, and I think the Court has heard testimony from Officer Tyree, as well as Officer Meinhard, that they did not have any basis whatsoever to arrest this man for a single charge until he came and made his statement about what [181] he and Michael Williams did and only –

THE COURT: If what you are going into now is to ask him if he lied to the officers, I'm not going to allow that.

MR. VON SCHUCH: Or the reason as to why it was wrong. He could do that. Once I say, "Didn't you tell the officer this" –

THE COURT: Yes.

MR. VON SCHUCH: – "isn't that a lie; isn't that against the facts" –

THE COURT: Then I'm going to allow it, but I'm not going to allow it at the first.

MR. VON SCHUCH: Well, then I would have an objection that he was outside the scope of direct examination, because this Court has ruled that the Commonwealth cannot ask him those series of questions. Therefore, if Mr. Ford were to do that, that would be outside the scope of direct examination and I would object. At that point I believe Mr. Cruse becomes his witness, as the Court has indicated.

MR. FORD: Once I ask him, in a particular statement, whether he made the statement to officer Tyree and whether in fact he said 'x' and 'x' was wrong, that impeaches him at that [182] point and after I've finished my cross examination, I think that Mr. Von Schuch is entitled at that point to come back and ask him on redirect, "Why did you make that statement; why was it wrong? What was the reason behind that?" He's trying to do that ahead of me. He's trying to do that on direct, which he can't, because he's basically impeaching his own witness.

MR. VON SCHUCH: I'm not impeaching my witness. I'm not asking him impeaching questions. Impeachment is asking him if he made a statement, having him deny it, admit it, or not remember it, and then bringing on another witness to show that he made an inconsistent statement. That's impeachment. I'm not

impeaching him at all. I'm simply explaining how he got to this point in time. Judge, he has testified that he made a statement to Officer Tyree and Meinhard. It was after that that he was charged. The question is why did he make that statement at that time. That's where we are right now.

MR. FORD: I would ask Mr. Von Schuch to proffer to the Court what his series of questions will be along those lines and find out where we [183] are going.

THE COURT: All right, let's see what he's going to say.

BY MR. VON SCHUCH: (Continuing)

Q On March 1st – Excuse me, I guess we were on March 2nd, Mr. Cruse, if you would answer these questions so the Court can hear the evidence. Did you have occasion to talk to Officer Tyree after you had a lawyer?

A After I had a lawyer?

Q Yes. At the Piedmont Jail?

A I didn't talk to him until I had a lawyer.

Q Yes, When Mr. Baber – Was he your lawyer?

A Yes.

Q – when he was there, did you talk to them at that time, Officer Tyree with Mr. Baber?

A Over at the Sheriff's Department, yes.

Q I'm sorry. Over at the Sheriff's. You were taken from the Jail to the Sheriff's Department.

A Yeah.

Q Did you talk to him at that time?

A Yes, I did.

Q Were any promises made to you at that time in exchange for your talking to them?

A Yes, it was.

[184] Q What was that promise?

A I can't remember.

Q Were you to get the death penalty?

A No. He wouldn't include that.

MR. FORD: I'm sorry for interrupting, but that is asking him what the basis for his statements are, and that's something that's proper on cross examination.

MR. VON SCHUCH: If we could just finish.

MR. FORD: Okay, I'm sorry.

BY MR. VON SCHUCH: (Continuing)

Q It was the next day, I believe, on March 3rd, that you had occasion to take officer Tyree to the river; is that correct?

A I know I took him there, but I don't remember which day.

Q And when you got to the river – to cut to the chase you showed him where certain items were, is that correct, and those items were recovered?

A Yes.

Q You were taken back to the jail?

A Yes.

Q Did you have occasion to have different lawyers after Mr. Baber was released from representing you?

[185] A Yes, I did.

Q Did you talk to the police again with your new lawyers –

A I can't remember.

Q – in the Sheriff's Department here?

A I believe so.

Q And is what you told Officer Tyree and the officers at that time what you have told the Jury?

MR. FORD: That's bolstering.

THE WITNESS: I'm not sure.

BY MR. VON SCHUCH: (Continuing)

Q You don't remember?

A I was confused then.

Q Well, do you remember talking to him in the Sheriff's Department?

A Yeah, I remember talking to him.

Q Do you remember what you told them the last time you talked to them?

A The last time I talked to them?

Q The first time you talked to them with these two gentlemen right here. Do you remember that?

A Yes. I told them what I'm saying now.

Q Do you remember what you told them?

A Exactly what I'm saying now.

[186] Q Is that what you're telling the Jury?

A Yes, it is.

Q Did you have any promises made to you at the time you told them the story that you have told the Jury?

A No, I did not.

Q Do you have any promises or are you testifying under any agreement at this time?

A No, I am not.

Q Are you charged with capital murder?

A Yes, I am.

Q Do you know what the maximum punishment for that is?

A Yes, I do.

Q What is that?

A The death penalty.

MR. VON SCHUCH: Judge, those would be the essence of that series of questions about those items.

MR. FORD: And I think at the time he asked him whether his statement is consistent with what he told the Jury just recently, that's bolstering because he hasn't been impeached at this point. When he says, "Is what you told your two lawyers, to the police, what you told the

Jury," that's bolstering at this point, because he has not been [187] impeached. And the evidence about, "Was it a deal? Do you have a deal," all of that stuff comes out on cross examination and then he can rehabilitate him, if he feels like he's been impeached, by asking him reasons behind it.

THE COURT: I'm going to do it that way.

MR. VON SCHUCH: What way is that?

THE COURT: I'm going to allow him to question once you've finished, other than that.

MR. VON SCHUCH: Am I entitled to ask him whether or not he has a plea agreement at this time with the Commonwealth?

THE COURT: Yes. You can ask him that and that's all.

MR. VON SCHUCH: In other words, the questions that the court is saying that I cannot ask him are whether or not what he told –

THE COURT: Whether or not he told them –

MR. VON SCHUCH: – the police is the same thing as what he's telling the Jury?

THE COURT: No. I don't want you to go into that unless he brings it up.

MR. VON SCHUCH: Well, Judge, he's going to bring it up. I mean, there's no question about that.

[188] THE COURT: I understand he's going to bring it up and then I'm going to allow you to bring it, you to cross examine.

MR. FORD: And that's proper.

MR. VON SCHUCH: You are going to allow me to cross examine him on that?

MR. FORD: Redirect.

THE COURT: I mean redirect.

MR. VON SCHUCH: I would be then entitled to ask him about talking to the police.

THE COURT: You would be allowed to go on all of those questions, I feel, all the questions that are brought up.

MR. FORD: After my cross?

THE COURT: After you cross.

MR. VON SCHUCH: Well, I'm talking about right now. I want to make sure I don't disobey any order of the Court and I'm asking – You have indicated that I can ask him whether he is testifying at this time pursuant to any plea agreement or promise with the Commonwealth, and you have indicated I could do that.

THE COURT: That's right, you can ask that.

MR. VON SCHUCH: I cannot ask him whether or not the statements that he made are the same as [189] the statements he made –

THE COURT: No.

MR. FORD: I would object to even allowing him to ask that one about the plea bargain.

THE COURT: I know you would object to that, but I'm going to allow it.

MR. FORD: Note my objection.

MR. VON SCHUCH: The Commonwealth would have an objection, too. We are entitled and we've got to have one.

THE COURT: All right. You may have an objection, too. Do you want one, too, Mr. Woodson?

MR. WOODSON: I don't believe; not right now. I'll save mine.

THE COURT: I was going to ask for a break when you got through here, but it looks like we've let the Jury have such a break.

MR. VON SCHUCH: I'm ready to go.

THE COURT: Bring them in.

(The Jury returned to the Courtroom, and in the presence of the defendant and counsel the following ensued.)

BY MR. VON SCHUCH: (Continuing)

Q Mr. Cruse, let me ask you, at this point in [190] time for what you are up there telling this Jury do you have any promises in exchange for your testimony and for what you're saying, from the Commonwealth of Virginia?

A No, I do not.

Do you know what you are charged with?

A Yes, I do.

Q What is that?

A Capital murder.

Q And do you know what the maximum punishment for that is?

A The death penalty.

Q And do you know who is going to decide whether or not you live or die at this point?

A Not really.

Q Have you ever been convicted of a felony?

A No, I have not.

Q Have you ever been convicted of a misdemeanor involving moral turpitude, such as lying, cheating or stealing?

A Yes, I have.

Q How many of those offenses?

A One, I think.

Let me ask you one more question, the last question. When you were at the Piedmont Jail under arrest for a misdemeanor firearms charge, you agreed to talk to [191] the police; is that correct?

A (No response.)

Q I mean, you had Officer Tyree come over and your lawyer was there and so forth and so on; is that correct?

A Over here at the Sheriff's Department?

Q Over here at the Sheriff's Department.

A Yes.

Q At that point in time were you charged with any of these offenses?

A No. I was not.

Q When were you charged with these offenses?

A After I talked to them.

Q Can you tell the ladies and gentlemen of the Jury why under those circumstances you would agree to talk to the police and why you talked to them at all in the first place about any of this?

A To get it off my chest.

Q To get it off your chest?

A (Witness indicates affirmatively.)

MR. VON SCHUCH: Would you answer any questions that Mr. Ford has, please?

[192] CROSS EXAMINATION

BY MR. FORD:

Q Mr. Cruse, your testimony in front of the Jury leaves me feeling that you had a detached involvement in this thing. You mentioned that Mike, told you to do this, it was Mike's idea to rob the store, Mike had them strip, that kind of stuff. Let me ask you this, your reaction to the suggestion to rob the Bear Creek Market was what?

A Yeah.

Q Okay, no problem. All right. How about going into the house? Did you have any reservations about that? You went in first, you said?

A Yeah. Mike told me to go in first.

Q Mike told you to go in first, so you went on in?

A Yes, I did.

Q No, problem. How about robbing and tying up the Kellers, you know? At the point that you were doing the robbery, you had gotten hold of a .38 pistol and you loaded it or It was loaded already. I'm sorry, whichever way it was. So you had a .38 fully loaded and yet you continued to ransack the house; is that right?

A Correct.

[193] A And Mike wasn't following you around with a gun or anything, holding it to your head at that point, was he?

A No, he was not.

Q And how about the rape of Mrs. Keller? He didn't have a gun on you then, did he?

A No, he did not.

Q And it didn't stop you from going outside with the Kellers. You could have run at that point in time, couldn't you?

A He told me to follow him. He said, "Come on,"

Q He wanted you to follow him, okay, and you were a long distance away, you said, kind of removing yourself from the situation?

A About ten foot.

Q I'm sorry?

A Maybe about ten foot, something like that.

Q But, nevertheless, you were in the back?

A Yes, I was.

Q And, of course, you participated also in setting the fire in the house?

A That's correct.

Q With Mike's direction; is that right? Mike made you do it?

[194] A He said, "We're going to burn the house," and I grabbed lamp fuel and did it.

Q Well, let me get to the part in the thicket now. You testified when Mr. Von Schuch asked you a question, I believe you said that there was yourself and Mr. Williams –

A Correct.

Q – and that opposite you was Mrs. Keller and opposite him was Mr. Keller; is that right?

A Correct.

Q And you said that they were approximately this far, to the end of the table right there, from you?

A Yeah, about around to the end of the table.

Did you look at Mrs. Keller when you fired the shot?

A No. I was looking at Mike.

Q Was your gun out here?

A Yes, it was.

Q So your gun was out and you turned your head?

A I was looking at Mike.

Q You were looking at Mike and you had your arm extended and Mrs. Keller was about right here. Would you say a foot?

A I don't really know.

[195] Q You don't remember?

A I don't –

THE COURT: He said he doesn't really know.

BY MR. FORD: (Continuing)

Q Doesn't really know, okay. But is that a close approximation?

A I'm not sure.

Q I'm just using your measurements. You told him to the end of the bench right there and I'm holding my arm out.

A Yeah.

Q And you also switched the gun several times. Your testimony is that first you had the .357, is that right because you showed it to Ms. James?

A Correct.

Q And then at some point when you are outside the house, you switched the gun. All of a sudden Mike has got the .357; is that right?

A Correct.

Q What was the plan for the gun? Why did you switch them?

A Mike wanted it.

Q You don't know, okay. So you get into the house and Mike has got the .357?

[196] A Correct.

Q And you don't have anything? Well, then you pick up a .38; is that right?

A Correct.

Q So now you've got a .38 and he's got a .357 and then you rob, you tie them up, and then you get back to where Mrs. Keller is in the bedroom. Now, you've taken her back there; is that right?

A (Witness indicates affirmatively.)

Q And you had tied them up before, hadn't you?

A Correct.

Q And so Mike still has the .357 and you've got the .38 and then at some point when you're coming in and he's going out, you switch the guns again?

A He wanted the .38.

Q He wanted the .38. No other reason but for that?

A I don't know.

Q That's when the switch occurred; is that right?

A (Witness indicates affirmatively.)

Q And then finally we get down to the woods and then you say you are leaving and you step out and you've got the .38 or the .357, which is it?

A At what point?

[197] Q When you are stepping out from the woods onto the roadway, do you have the .38 or the .357?

A After the shooting?

Q Yes.

A I had the .357 at that time.

Q You had the .357, and then as you are walking up the road, you switch it again?

A No. Right when we come out of the woods he handed me the .38 to reload and I handed him the .357 so I could reload the .38.

Q So you passed guns back and forth three or four times for no particular rhyme or reason? I mean, there was no plan to switch the guns, was there?

A No.

Q Now, let's get to you talking. There's been some evidence about your making some statements to the police officers at various points in time; is that right?

A Right.

Q Let's take the first one. On March 1st when you were interviewed by Deputy Meinhard and I believe, Special Agent Tyree, what did you tell them? Did you tell them the story you're telling the Jury now?

A No, it was not.

Q What did you tell them in that first story?

A We went to Richmond, bar hopping.

[198] Q So you told them you went to Richmond, bar hopping, and that was it?

A I believe so.

Q Do you recall telling them that you had been to Bear Creek Market and called from there and gotten a ride to Richmond?

A I believe so, something, or his –

Q Okay. So you told them something like that?

A – his cousin's house or something.

Q And you didn't remember what part of Richmond you traveled to? You just went bar hopping that night?

A I don't know my way around Richmond.

Q So this is the first time to the police officers, so you're lying to the police officer at that point, right?

A Correct.

Q The second contact you had was on March 2nd and that one you asked for a lawyer, basically?

A Correct.

Q The heat was starting to come on. Had you been arrested for a misdemeanor? Was that when you were picked up for the misdemeanor firearms charge, a concealed weapon or something?

A Yeah.

[199] Q So then we get to the third time you talked with Agent Tyree, and now we're starting to get a little bit more in depth. Now you're starting to say, "Well, I guess I'd better tell them something." Is that right?

A I told them all of it.

Q You told him all of it? Are you sure?

A All the questions he asked.

Q All the questions he asked. I guess that's the key phrase, isn't it, all the questions he asked? Did he ask you about the rape?

A I'm not sure; I can't remember.

Q You're not sure. In fact, you didn't tell him about the rape, did you, on this particular occasion?

MR. VON SCHUCH: Judge, here I would object as being outside the scope of direct, as I indicated before. I felt these were questions that the Commonwealth had the right to ask and bring to the Jury first and I would make that objection at this time.

THE COURT: Overruled.

BY MR. FORD: (Continuing)

Q You didn't tell him about the rape, did you?

A At what point?

Q The third statement, I'm talking about, [200] March 2nd, Special Agent Tyree, Cumberland County Sheriff's Office. Mr. Woodson is there and Mr. Baber is there; is that right?

A Correct.

Q And you made a fairly detailed statement, some fifteen pages of questions and answers, and not once in there did you mention the rape of Mrs. Keller, did you?

A They didn't ask me.

Q They didn't ask you. Did you also tell Agent Tyree that you took the stuff and sold it in Richmond?

A Yes, I did.

Q All the stuff that you had taken from the house, you told him you sold it in Richmond, didn't you?

A Yes I did. I was trying to protect my friends.

Q And that the only reason you went to Fredericksburg, was to throw the stuff in the river and burn the vehicle, and that was a lie, wasn't it?

A About –

Q Selling the stuff in Richmond?

A Yes. I was trying to protect my friends at that point.

Q I'm sorry?

A I was trying to protect my friends at that [201] point.

Q Protect your friends. Well, that's a noble cause.

MR. VON SCHUCH: Judges I object to the commentary.

MR. FORD: I'm sorry, Judge. I apologize. I'll not make that comment again.

THE COURT: Don't do it again.

BY MR. FORD: (Continuing)

Q So you were trying to protect your friends by not mentioning anything about that?

A (Witness indicates affirmatively.)

Q Doesn't it seem reasonable to you that you are trying to protect yourself at this point?

A No. I was keeping them out of it.

Q And you protect your friends –

A I was keeping them out of it.

Q I'm sorry?

A I was trying to keep them out of it.

Q Trying to keep them out of it. It stands to reason, doesn't it, that you hold yourself in higher esteem than you do your friends don't you? I mean, you want to protect yourself a lot more than you do your friends, don't you?

[202] A In a way.

Q In a way. So what you're doing is you're telling us a lie at this point too. You're protecting yourself –

A I'm not protecting myself. No.

Q – by telling these jury members that Mike Williams is the one that fired the trigger, that he is the one that did all the shootings and all you did was fired one time and then stepped away. Isn't that the truth, Mr. Cruse?

A Did I say that? I don't believe I did.

Q I'm asking you if that's the truth.

A No, it's not the truth.

Q Are you trying to protect yourself now?

A I am not trying to protect myself.

Q Well, we've got you lying in your first statement. We've got you lying in your third statement. And you just said that you didn't mention the rape because they didn't ask about it; is that right?

A I don't think it was exactly lying. I just wasn't telling all the story at the same time. It's all the same. It's been all the same only I added more to it until I gave them everything that happened.

Q I understand where you might be able to leave a rape –

[203] A I'm not lying.

Q – out of a situation like that. I mean, that's not something that really comes to mind very easily.

MR. VON SCHUCH: Judge I object. That's argumentative.

THE COURT: Please don't do that again.

MR. FORD: Yes, sir Judge.

BY MR. FORD: (Continuing)

Q And isn't it a fact that you didn't tell the police about the rape incident until they had talked to Johnny Williams and then they came back to you and asked you point blank about that, hadn't they?

A And then I answered them point blank.

MR. VON SCHUCH: Judge, excuse me, I would object. I don't know how he would know what Johnny Williams told the police.

BY MR. FORD: (Continuing)

Q I'll rephrase it. At some point in time the police came back to you and asked you about the rape, confronted you directly about it?

A Correct.

Q And then you said yes?

A I told them.

[204] Q And in point of fact at that point in time you had been charged with just first-degree murder?

A I'm not sure.

Q You're not sure? Mr. Woodson, the Commonwealth's Attorney, was there during your third questioning, or actually your second questioning, so at some point in time they issued first-degree murder warrants for you then; is that right?

A Correct.

Q And then once the rape came out, that blew that deal, didn't it? That was a deal, wasn't it?

A Yes, it was.

Q A deal for your testimony?

A Yes, it was.

Q And you're saying, or you're telling the Jury, that there's no deal for your testimony now?

A No, there is not.

Q That you just stand there with a capital murder charge and the ultimate penalty is death?

A That's right.

Q And you are here on the stand today to help yourself in making your case, aren't you?

A I'm getting it off my chest.

Q You're getting it off your chest, but you're also getting the death penalty off your back aren't you?

[205] A Not really.

Q Have you talked with the Commonwealth's Attorneys about your testimony –

A What do you mean by that?

Q – either one of them? I'm sorry?

A What do you mean by that?

Q It's just a simple question. Have you talked with them about your testimony? Have you discussed with either Mr. Woodson or Mr. Von Schuch what you are to testify to today? Have they gone over your statements with you?

A I went over it with my lawyers.

Q With your lawyers. How many times have you gone over it?

A I'm not sure.

Q You're not sure. When was the last time you went over it with your lawyers; a day ago?

A It's been a little while ago.

Q A little while ago; how long ago, yesterday?

A A couple of weeks or something like that.

Q A couple of weeks? You haven't talked to your attorneys in a couple of weeks about this case?

A Oh, my attorneys, yes.

Q Well, that was the question.

A Okay.

[206] Q So yes. When did you last talk with your attorneys about this case?

A Today.

Q Today, all right. And you discussed your testimony with them, didn't you?

A I believe so.

Q What you were going to testify, what was going to be asked of you, what was going to be asked on cross examination, maybe?

A I believe so.

Q You believe so? Yes or no?

A Yes.

Q We also had a preliminary hearing here back in June of '93. Do you recall testifying in this case in a preliminary hearing in this case?

A Correct.

Q And as part of that preliminary hearing I asked you several questions on cross examination. One of those questions, and let me ask you this, do you recall me asking you, "Have you ever been convicted of a crime involving lying, cheating or stealing?" Do you recall that question?

A Yes, sir.

Q Do you recall your answer being, "No, sir"?

A Yes, I do. I was confused on that question.

[207] Q You were confused on that question. It was under oath, wasn't it?

A Yes, it was.

Q So you were lying at that point, too?

A I was confused at that point. I wasn't sure.

Q You were confused. What was confusing about that question to you?

A A lot of things. If you went through the ordeal I did and you have a lot of shit on your mind – pardon my language.

Q So it was confusing if I asked you, "Have you ever been convicted of a crime involving lying, cheating or stealing"? That was confusing to you?

A Correct.

Q But with all that stuff on your mind, you've been able to get our all of these facts that you've just testified to, to the Jury; is that right?

A Correct.

Q One other thing that puzzles me a little bit about the actual shootings in the thicket.

MR. VON SCHUCH: Judge, again, I would object to the commentary without it being attached in any way, shape or form to some kind of a question.

[208] THE COURT: Whether it puzzles you or not –

MR. FORD Well, I'm just trying to –

THE COURT: Go ahead. Well, just ask him the question.

BY MR. FORD: (Continuing)

Q Recalling your attention back to the shootings, you said that Mike fired first, you fired second, and that at some point in time Mike stepped back in surprise because Mr. Keller was getting up; is that right?

A Correct.

Q Had you moved at that point?

A I think I like jumped when I caught him out of the corner of my eye.

A And you and Mike weren't wearing any hoods or masks were you, while this robbery and things were going on at the Keller residence? They had a good look at your face, didn't they?

A Well, I had my hood over my face and my hair just a little bit showing until Mike took off his and then I went ahead and took off mine.

Q So you took off yours and you were walking around the house without any disguise on? You weren't disguised or anything like that, were you?

[209] A No.

MR. FORD That's all the questions I have, Judge.

REDIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Mr. Cruse, let's go back and talk about the statements that you made to the police. The first statement you made was when you agreed to come down here, as I understand it, and they confiscated your boots; isn't that correct?

A Correct.

Q Did they ask you questions about the Kellers and what happened at the Keller residence and whether or not you were involved in that?

A At the point they took my boots?

Q Well, at any time when you were down here and they were talking to you.

A I believe so.

Q And did you make any admission or tell them in any way, shape or form that you were involved in this?

A That I wasn't?

Q That you were involved.

A Oh, that I were? Yes, I did.

Q No. I'm talking about the first time you [210] came down here.

A Oh, the first time?

Q Yes.

A No, I did not.

Q And that was a lie?

A Yes, it was.

Q Why did you lie to the police at that time?

A Because that was the story Mike made up.

Q Well, why did you tell it?

A I really don't know.

Q Well, what would have happened if you had told them the truth?

A I don't know. I was confused at that time.

Q Well, did you think they were just going to say, you know, "Don't worry about it. Just don't let it happen again"?

A No.

Q The second time you had an attorney, is that correct; Mr. Baber?

A Correct.

Q And I think this where we left off. You agreed to make a statement to the Commonwealth and did so at that time; is that correct?

A Correct.

Q And was that pursuant to a plea agreement [211] with the Commonwealth?

A Yes, it was.

Q I'm going to show you this and ask you if you can identify that, please. Take your time and read that.

A Yes, I do.

Q Can you read that to the ladies and gentlemen of the Jury, please?

A "I understand that if I cooperate with the Commonwealth, testifying against the other defendant in this case, agree to take a polygraph which corroborates my statement" –

MR. FORD: Judge, I'm going to object to any mention at this point, of reading his statement.

BY MR. VON SCHUCH: (Continuing)

Q Does not it state in there that you will not receive the death penalty?

A Yes, it does.

MR. VON SCHUCH: Insofar as that is concerned, I offer the agreement at this time.

THE COURT: This is *Thirteen*.

[212] BY MR. VON SCHUCH: (Continuing)

Q Mr. Cruse, you then talked to the police; is that correct?

A Correct.

Q And what did you tell them about what you and Mr. Williams did insofar as raping Mrs. Keller?

A I can't remember.

Q Did you tell them anything about it?

A I can't remember. I try not to think of that.

Q Well, you're going to have to think about it. The second time you talked to them, when you had that agreement, did you tell them about the rape?

A I don't think so.

Q What happened to that agreement?

A It was taken away, because on a later statement I told them more about the case.

Q About the rape. So that's gone?

A Correct.

Q You've indicated to the Jury you're charged with capital murder right now; is that correct?

A Correct.

Q Is it your understanding that the judge is going to decide whether you live or die?

A Correct.

[213] Q Who are your lawyers? Are they in the courtroom?

A Donald Blessings and Lee Harrison.

Q The last time you talked to the police you made a statement to them telling everything that happened; is that correct? Do you remember that?

A Correct.

Q And I'm not talking word for word. Essentially, is there any difference between what you told the police at that time and what you've told the Jury today?

A No, there is not.

Q I believe that Mr. Ford asked you about a preliminary hearing and I think he asked about, apparently, you having a misdemeanor conviction for lying, cheating or stealing, one conviction?

A That's correct.

Q You did not tell the Court that at that time, if I understand your testimony?

A Correct.

Q And I believe you indicated it was because you had a lot on your mind, and you used profanity?

A I was confused.

Q What was on your mind?

A Everything that happened.

[214] Q Everything that happened. I believe I tried to show you some pictures the other day, didn't I?

A Yeah.

Q What happened?

MR. FORD Objection, Judge. I don't think that has any relevance. What his reaction is to pictures has no relevance and no bearing on this case.

MR. VON SCHUCH: I think it has to do with his credibility. It has to do with how he feels. He is testifying, if it please the Court, that he wants to get this off his chest. And I think if his reaction is –

THE COURT: Answer the question.

MR. FORD: Note my exception, Judge.

BY MR. VON SCHUCH: (Continuing)

Q I tried to show you show pictures the other day. Do you remember what those pictures were of?

A The murder scene.

Q Did you look at those pictures?

A No, I did not.

Q What happened?

A I lost it.

Q How do you feel about what you have done to [215] the Kellers?

MR. FORD Judge, again, I renew my objection. That has nothing to do with this case. He is simply trying to play to the Jury's feelings.

THE COURT: Sustained on this.

MR. VON SCHUCH: Judge, again, I would submit to the Court, and I don't mean to argue, but his credibility has been placed in issue. He has indicated that

he has some feelings about this, what he has done, and I would submit to the Court that if he –

THE COURT: I think that you've shown that by what's already been said by this gentleman, and I think you've shown it sufficiently.

MR. VON SCHUCH: That's all the questions I have for Mr. Cruse.

MR. FORD No recross, Judge.

* * *

[This Exhibit Was Handwritten Originally]

Com. Ex 13
Jan. 4, 1994
/s/ JRS

I understand that if I cooperate with the Commonwealth, testify against the other defendant in this case, agree to take a polygraph which corroborates my statement,

the Commonwealth will ~~recommend that~~ inform the court of my cooperation in this case and will not ~~I receive a total active sentence of~~ ~~not~~ seek the death penalty in my case. ~~more than 50 years as an~~

~~appropriate sentence for me in this case.~~

/s/JPB
/s/JC
/s/RCWJr

3/2/93
/s/ Jeffrey A. Cruse
Jeffrey A. Cruse

/s/ James Baber
James P. Baber Defense Atty

/s/ Robert G. Woodson Jr.
Robert G. Woodson Comm. Atty.

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

* * *

[239] The witness, DEBORAH KAY, M.D., having first been duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Good afternoon, Dr. Kay.

[240] A How are you?

Q Could you give the ladies and gentlemen of the Jury your name, please?

A My name is Deborah Kay.

Q Dr. Kay, would you tell us what you are employed as, please?

A I'm an Assistant Chief Medical Examiner for the Commonwealth of Virginia.

Q And as such, can you describe what you do, what your job is and exactly what you do?

A My job entails determining cause and manner of death in cases which may be of importance to the State. I do that by performing external and internal examinations, when they are required, on a deceased person, consulting with law enforcement, consulting with other

forensic experts, looking at other investigative reports and possibly medical records if they are so needed.

Q Dr. Kay, can you indicate to the Jury what educational background you have, please, first, and then –

MR. FORD: Judge, we'll stipulate that she's a qualified medical examiner. I don't have any problem with that. I'll offer the stipulation to the Commonwealth if he wishes to accept it.

MR. VON SCHUCH: Judge, I would appreciate it. I thank Mr. Ford for that. I would offer [241] her to the ladies and gentlemen of the Jury as an expert in the area of forensic pathology, a job description I believe she has just given to the Jury.

MR. FORD: No objection.

THE COURT: The Court certainly recognizes Dr. Kay as an expert.

BY MR. VON SCHUCH: (Continuing)

Q Dr. Kay, let me ask you, did you have occasion to be involved in the autopsy on the deceased in this case, Mary Elizabeth Keller?

A Yes, I did.

Q Let me ask you, did you have occasion to notice injuries to Mrs. Keller?

A Yes.

Q What specific injuries did you note?

A There were some scrapes on the knees. There was a bruise on the right leg and there were three gunshot wounds, all of which initially entered the face.

Q Did you have occasion to label each one of the wounds for reference?

A Yes. I numbered them just for reference. That does not reflect any particular order. I'm not able to determine the order in which they occurred. It's just [242] to keep track of them..

Q The gunshot wound that you have labeled as Gunshot Wound Number One, can you tell the ladies and gentlemen of the Jury the location of the entrance wound, please?

A Yes. That wound was at the edge of the left lower eyelid. That's where it entered.

Q And can you tell them the tract that the bullet took?

A Yes. It went through the left eyeball and then entered the head and passed into the brain matter.

Q Can you indicate the direction insofar as upwards, downwards, left to right or front to back?

A It went from front to back, from the deceased left to right, and upwards.

Q Can you indicate to the ladies and gentlemen of the Jury whether this wound, based on the damage that it had caused to the brain, would be a lethal wound in and of itself?

A Yes. This would be in and of itself. It could be a lethal wound.

Q Was there an exit wound to this Gunshot Wound Number One?

A No. I recovered a bullet in the brain material.

[243] Q Dr. Kay, I'm going to show you this item, if you would, please.

A Yes. There is a bullet in here and my bullet carved with my signature.

Q Was that the bullet that was recovered from Gunshot Wound Number One?

A Yes.

Q Let me ask you, was there any evidence of close-range firing with regards to this Gunshot Wound Number One?

A No. Not on the body, no.

Q Looking at the entrance of the gunshot wound – First of all, can you describe what a reentry is or a reentrance wound?

A A reentrance wound would be a wound that generally tends to be irregular. Wounds where a bullet has not hit or gone through some thing else before, generally tend to be round.

Q Based on the pathology of the entrance wound, can you tell the ladies and gentlemen of the Jury whether, in your opinion, it is possible that this could be a reentry wound?

A It's possible that it could be.

Q Can you indicate to the ladies and gentlemen of the Jury insofar as Gunshot Wound – Well, let me ask [244] you this. Did you have occasion to find any fibers of any sort in Gunshot Wound Number One?

A No, I did not.

Q Gunshot Wound Number Two, can you tell the ladies and gentlemen of the Jury the entrance location of Gunshot Wound Number Two?

A That's on the left cheek.

Q Can you give them the direction, the track that the bullet took and the direction that it took?

A Well, that went front to back, left to right, and upward.

Q Would it be approximately the same angle as Gunshot Wound Number One or is that an unfair question?

A I don't measure the angle, so I'm just giving general directions.

Q The damage that was caused by that wound?

A That bullet also entered the brain material and passed out of the head. There was an exit wound.

Q Where was the location of the exit wound?

A That's on the right side of the head, in the back.

Q I think you indicated in your report that the gunshot exit could be caused by a bullet or a bone fragment; is that correct?

A Well, there may have been a combination. I [245] did recover a small fragment in the brain itself, so there may be bone and bullet fragments exiting there.

Q Let me ask you this. Based on the damage that was caused by this wound, is this a wound that would be lethal in and of itself?

A Yes, this could also be lethal.

Q Did you have occasion to recover – You indicated that there was an exit wound; is that correct?

A Yes.

Q Did you nevertheless have occasion to recover a bullet or fragments of a bullet in that track?

A A fragment.

Q A fragment?

A Uh-huh (yes).

Q Let me show you 18-D.

A Yes. There are fragments here and this has the autopsy number, her name and my signature on it.

Q And this is where the bullet recovered from Gunshot Wound Number One, that track, has marked – do you see an 18-A on it?

A Yes.

Q These fragments from Gunshot Wound Number Two are marked with what is labeled 18-D; is that correct?

A That's right. That's not my labeling, that's someone else's.

[246] Q But that is marked on the package that way?

A Uh-huh (yes).

Q Now, did you have occasion to recover a bullet, as well, from the body bag that Mrs. Keller came in?

A There was a bullet recovered from that body bag, yes.

Q I'm going to show you an item marked on the package as 18-C and ask you if that appears to be the bullet recovered from the body bag of the deceased in this case, Mary Elizabeth Keller?

A Yes.

Q Now, insofar as Gunshot Wound Number Two was concerned, did you have occasion to find fibers in the track of Gunshot Wound Number Two?

A There were some fibers in there, yes.

Q Gunshot Wound Number Three, can you indicate to the ladies and gentlemen of the Jury the location of the entrance of Gunshot Wound Number Three?

A That was also on the left cheek.

Q Can you give them some idea of the tract that the bullet took?

A Yes. That broke the left side of the jaw, went into the neck, involved what we call the thyroid cartilage, that's part of the voice box, grazed the [247] esophagus, went into the right lung and exited the chest cavity.

Q Now, if I understand what you're saying, is the track of this bullet somewhat different than the first, than Gunshot One and Gunshot Two?

A Yes.

Q You indicated that there was an exit wound to Gunshot Wound Number Three; is that correct?

A Yes, there is an exit.

Q And where would that be?

A The exit was in the back.

Q Now, however, did you have occasion to recover a bullet or jacket or some other item in that track?

A I recovered a bullet jacket in the soft tissues of the back.

Q I'm going to show you this item and ask if you can identify that.

A That's a bullet jacket and it has my signature on the bullet card.

Q Now, that has a special marking on it, too; is that correct?

A Yes.

Q And what is that?

A I believe you are referring to the 18-B.

[248] A Yes, 18-B. Again, let me offer them at this time. The exhibit marked 18-A you have identified as coming from Gunshot Wound Number One; is that correct?

A Yes.

MR. VON SCHUCH: Judge, what exhibit number would this be?

THE COURT: This would be *Exhibit Number Twenty-Eight.*

MR. VON SCHUCH: I would offer that as Number Twenty-Eight at this time.

BY MR. VON SCHUCH: (Continuing)

Q Gunshot Wound Number Three had an exit, yet you recovered a jacket. Did the track split, that the jacket was over here and yet there was an exit in the back?

A Well, the jacket was in the soft tissues of the back. The exit was also in the back.

MR. VON SCHUCH: This item, Judge, that has the marking 18-B on it and was recovered from Gunshot Wound Number Three, I would offer as *Commonwealth's Exhibit Number Twenty-Nine.*

THE COURT: So entered.

MR. VON SCHUCH: This gunshot wound that was identified by the doctor as having the marking 18-D. and I believe she indicated it was [249] recovered from Gunshot Wound Number Two.

THE COURT: *Thirty.*

MR. VON SCHUCH: 18-C, which was found in the body bag, I would offer as *Number Thirty-One.*

BY MR. VON SCHUCH: (Continuing)

Q Let me ask you at this time. You have indicated, I believe, that you found fibers in the track of Gunshot Wound Number Two; is that correct?

A Yes.

Q Did you have occasion to find fibers also in the track of Gunshot Wound Number Three?

A Yes, there were some.

Q Did you have occasion to take what is known as a PERK kit on the deceased, Mary Elizabeth Keller?

A I obtained vaginal and anal swabs, pubic hair and head hair.

Q And what did you do with those? Was blood also taken at this time?

A Yes.

Q What was done with the PERK kit, or the physical evidence that you recovered from her?

A Those were turned over to Special Agent Hipkins.

Q The clothing that Mrs. Keller wore, what was [250] done with that clothing that she was wearing at the time she came in?

A That also went to Special Agent Hipkins.

Q The bullets and fragments that we have offered into evidence, who took possession of those?

A Special Agent Hipkins.

Q Now, as part of your duties, do you put together what is known as an autopsy report?

A Yes.

Q Let me ask you this. Do you have a copy of the autopsy report concerning the deceased in this case, Mary Elizabeth Keller?

A Yes, I do.

MR. VON SCHUCH: Judge, I would offer that at this time as *Commonwealth's Exhibit Number Thirty-Two.*

BY MR. VON SCHUCH: (Continuing)

Q Let me ask you again. Did you have occasion to state in the report the cause of death, for the record, of Mary Elizabeth Keller?

A Yes,

Q And that was?

A Gunshot wounds of the face.

Q Were you present when the autopsy was [251] performed on the deceased in this case, Morris Keller?

A Yes.

Q Would you tell the ladies and gentlemen of the Jury the injuries that you noted to Mr. Morris Keller?

A There was an abrasion on the left shoulder, actually several abrasions on the left shoulder; some on the back; abrasions on the forearm; and there were five gunshot wounds.

Q Did you have occasion again to label the different gunshot wounds, not by the order in which they were inflicted; is that correct?

A They are labeled, but there is no order.

Q Gunshot Wound Number One to Mr. Keller, can you indicate to the ladies and gentlemen of the Jury where that was located, please?

A The entrance is on the left side of the head.

Q And can you indicate, are you familiar with the term "stippling"?

A Yes.

Q What is that?

A That refers to marks left by burns and unburned gunpowder on the face or an item of clothing. I shouldn't say just face; on the skin or item of clothing.

Q Did you have occasion to find stippling [252] around this Gunshot Wound Number One to Mr. Keller?

A There is stippling on that side of the face, yes.

Q And what does that indicate in terms of pathology?

A We use it as a pathologic term. That indicates what we call an intermediate range gunshot wound. When we see stippling, we use that term. It means that more or less the gun was fired at close range.

Q Was this the only gunshot wound that he had to the left side of his face or his head?

A The entrances of the other gunshot wounds are on the right. Well, there are two on the right side of the face.

Q Can you indicate to the ladies and gentlemen of the Jury the track that this bullet took, please?

A This one went left to right, front to back, and upward.

Q Did it enter the brain?

A Yes, it did.

Q Would this be described by you as a wound lethal in and of itself?

A It certainly could be.

Q Now, can you indicate to the ladies and gentlemen of the Jury, was there an exit wound associated [253] with Gunshot Wound Number One?

A Yes. There was an exit on the right side of the head.

Q Did you have occasion to find some minute fragments in that gunshot wound?

A These fragments were recovered by Dr. Boone, and that's her signature on there.

Q There was no bullet or anything larger than those fragments recovered from Gunshot Wound Number One; is that correct?

A There was nothing. Actually, there were bullet fragments recovered from the brain material and they were associated with Gunshot Wounds Number, what we've labeled Number One and Number Two. We're not able to say precisely which ones those came from.

MR. VON SCHUCH: Judge, I would offer this as Commonwealth's, I believe it's Thirty-Three.

THE COURT: *Thirty-Three.*

BY MR. VON SCHUCH: (Continuing)

Q The next wound would be Gunshot Wound Number Two; is that correct?

A Yes.

Q And where did Gunshot Wound Number Two enter?

[254] A That was on the right side of the head.

Q Can you give the ladies and gentlemen of the Jury an indication of the location?

A Entrance Number Two is on the right side of the head behind the ear.

Q Can you describe the track of the bullet?

A That bullet also passed through the brain.

Q Was there an exit wound associated with that gunshot wound, as there was with Number One?

A Yes. The exit was on the left side of the head.

Q Again, were any bullets or fragments associated with Gunshot Wound Number Two recovered?

A Just what we talked about.

Q Was there any evidence of a close-range firing insofar as Gunshot Wound Number Two is concerned?

A No.

Q Was there any stippling around Gunshot Wound Number Two?

A No, there wasn't.

Q Can you give the ladies and gentlemen of the Jury the location of Gunshot Wound Number Three, which I believe was the third shot to the head?

A Number Three is on the right side of the head and that's in front of the ear.

[255] Q Can you describe the track that Gunshot Number Three took?

A That bullet went right to left and went through the facial bones.

Q If you could, using your own head, can you describe the entrance and exit of this particular gunshot wound?

A Well, the entrance is about here, the exit on the other side about here.

Q Did that pass through the brain?

A It did not.

Q What would you say about the lethal effect of that wound not entering the brain?

A Sometimes bullets can pass through the face and cause enough injury to the base of the skull and the brain to be fatal, so it's possible that it was. Since we had other wounds, you really cannot evaluate what individual damage that bullet would have done to the skull or the brain.

Q If it was the first wound inflicted and the only one inflicted, would you call it a potentially lethal wound in and of itself or not?

A Well, if it's the only wound inflicted, you would just have to judge that by the outcome.

Q Would it be fair to say that it contributed [256] to the death of Morris Keller in this case?

A Yes.

Q Again, was there an exit wound associated with Gunshot Wound Number Three?

A Yes, there was an exit wound.

Q If this was the first gunshot wound inflicted to the deceased, would it be possible for him to exercise, even after the infliction of this wound, some movement prior to the other wounds being inflicted?

A That might be possible.

Q I believe the next wound would be Gunshot Wound Number Four; is that correct?

A Yes.

Q Can you give the ladies and gentlemen of the Jury the location of that wound, please?

A There's a wound on the thigh, right thigh.

Q Was this a through and through entrance/exit?

A Yes, it was.

Q Let me ask you this. In determining entrance and exit as to that gunshot wound, did you use the aid of the residue powders on the clothes?

A At the time the autopsy was performed, no.

Q Subsequently?

A Subsequently, we did have the knowledge of [257] the residue on the clothing, which indicate that instead of coming from – that we may have reversed the entrance and exit there. We cannot determine that for certain.

Q No bullet was recovered from this, correct?

A No.

Q The track of the wound did or did not strike any bone or anything else of that nature; strictly soft tissue?

A Soft tissue, that's it.

Q The same thing, Gunshot Wound Number Five, was that also to the right leg?

A Yes, right lower leg.

Q Going back to Gunshot Wound Number Four, the track or the angle of that wound through the leg, can you describe that, please? Did you measure the inches up from the knee or down from the knee for each of the entrance and exit wounds?

A Well, the defect on the right posterior thigh is twenty-four and three-quarter inches from the ankle. The other hole, right posterior thigh, is twenty-six inches from the ankle.

Q Again, this was through and through soft tissue, struck no bone?

A Yes, correct.

Q Now, did you have occasion to determine the [258] cause of death, for the record, of Morris Keller?

A Yes. Gunshot wounds of head and right leg.

Q Was gunshot wound included in the evaluation as contributing to the cause of death?

A I feel that any gunshot wound, even if it might not be lethal, in and of itself is contributory.

Q Dr. Kay, insofar as Mr. Keller is concerned – You have described what you have done insofar as collecting a PERK kit from Mrs. Keller. Did you do the same thing, indicate whether or not blood, hair samples and other items were collected from Morris Keller?

A Dr. Boone made those collections.

Q All right, and are they so listed in the autopsy report?

A Yes.

Q Do you have a copy of the autopsy report of the deceased in this case, Mr. Morris Keller?

A Yes, I do.

MR. VON SCHUCH: Judge, I would offer that at this time as a Commonwealth's Exhibit.

THE COURT: *Thirty-Four.*

BY MR. VON SCHUCH: (Continuing)

Q Dr. Kay, I am going to show you this diagram which I have drawn and I want you, or can you, if you [259] would, please, does this correctly indicate the entrance wound of Gunshot Number One?

A Yes.

Q Approximately?

A Approximately, yes.

A I understand there are no measurements to it, but does that approximately indicate it?

A Yes.

Q If it please the Court, the exhibit number of the bullet recovered from there was Twenty-Eight; is that correct? That would be 18-A marked on the – 18-A would be Exhibit Twenty-Eight. Now, is that the approximate – and again, not measured per se – but the approximate location of Gunshot Wound Number Three?

A Yes.

Q And I believe you indicated that the exhibit that was 18-B and is now Commonwealth's Exhibit Number Twenty-Nine was recovered from the track of Gunshot Wound Number Three; is that correct?

A Yes.

Q That would be Number Twenty-Nine. Is that the approximate location of Gunshot Wound Number Two?

A Yes,

Q And I believe you indicated that 18-D was recovered from the track of Gunshot Wound Number Two; is [260] that correct?

A Yes.

Q And that is now Commonwealth's Exhibit number Thirty. 18-C noted on the chart here at this time has simply been identified as coming from the body bag; is that correct?

A That's right.

Q And that would be Commonwealth's Exhibit Number Thirty-One. Does that chart accurately, at this point, identify then the entrance wounds and the bullets recovered from each one of the tracks as they are marked?

A I believe it does.

MR. VON SCHUCH: Judge, at this time I would offer this for identification purposes only, until Ms. Jones testifies, as Commonwealth's Exhibit, I believe this would be Thirty-Four.

THE COURT: Thirty-Four, identification only.

THE CLERK: Thirty-Five.

THE COURT: *Thirty-Five*; I'm sorry.

MR. VON SCHUCH: Dr. Kay, as the Judge is marking that, that's all the questions I have. Would you please answer any questions that Mr. Ford has?

[261] CROSS EXAMINATION

BY MR. FORD:

Q Dr. Kay, good afternoon.

A Hi.

Q You indicated on both bodies that there were scrapes on various parts of the bodies.

A Yes.

Q Would that be indicative of a beating that was received or would that be indicative of more scrapes from possibly going through the woods, or can you tell?

A I really can't say.

Q You can't say. Was there any bruising or –

A This does not seem to be like a beating, but I, you know, cannot be certain.

Q Calling your attention to the examination of Mrs. Keller –

A Okay.

Q – you said that Shot Number One was a lethal wound; is that correct?

A Correct.

Q And Shot Number Two was a lethal wound, was it?

A Yes.

Q I don't know if I just missed it or whether [262] you didn't say, was Shot Number Three a lethal wound?

A Yes, most certainly. All of those wounds could have caused death.

Q In and of themselves?

A In and of themselves, each individually.

Q Now, calling your attention to Mr. Keller's wounds –

A Okay.

Q – and Mr. Von Schuch asked you with particularity to Shot Number Three, which passed through the face, basically?

A Yes.

Q And you indicated to him that that was a contributing factor to the death; is that right?

A It's contributing and on occasion in and of itself that type of wound can be lethal, but you cannot evaluate that because you have two other wounds that actually went into the head.

Q Okay. So my question to you, the first two, Shot Number One and Shot Number Two, were most definitely lethal wounds; is that correct?

A They are certainly potentially lethal, yes.

Q And Shot Number Three may have been lethal, but you cannot tell, in and of itself?

A That's correct.

[263] MR. FORD: That's all the questions I have.

REDIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Let me just ask you, the Gunshot Wound Number Three, does the amount of fracture associated with that affect how lethal a wound it would be?

A Well, there are fractures in the facial bones that would generally, I should think, not cause a lethal problem unless there were complications down the road from

that. How much of the skull was fractured by that bullet alone is impossible to say and, as I mentioned, I have seen bullets that go through the face that fracture the base of the skull and also cause injuries to the brain without those other two.

Q If more fracture is associated with – in other words, the greater the fracture, is that –

A You can't judge it simply on a fracture.

Q You can't do that?

A No. You can't judge it on a fracture alone, and there are three wounds to the head, so you have to take them all together.

Q And in your opinion, they all three contributed?

A The first two are more serious in the sense [264] that I could see that they passed into the brain, so that those two are definitely potentially lethal. The third one did not, but I cannot separate the effects of that bullet versus the other two.

MR. VON SCHUCH: Thank you, Dr. Kay. Judge, that's all the questions that I have.

THE COURT: Dr. Kay, you may be excused.

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

COMMONWEALTH OF VIRGINIA

v.

MICHAEL WAYNE WILLIAMS

THE HONORABLE JOHN R. SNODDY, JR., PRESIDING

TRIAL – DAY THREE

Cumberland, Virginia
January 5, 1994

* * *

[54] The witness, LISA C. SCHIERMEIER, having first been duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Would you give the ladies and gentlemen, of [55] the Jury your name, please?

A My name is Lisa C. Schiermeier, spelled S-c-h-i-e-r-m-e-i-e-r.

Q Can you tell the ladies and gentlemen of the Jury whether or not you are employed?

A I'm employed with the Virginia Division of Forensic Science, which is the crime laboratory system for the State of Virginia.

Q What is your specific job? Can you give us some detail about your job description and what you do, please?

A As a forensic scientist, I specialize in the field of serology, and serology deals with the study of blood and body fluids. And, therefore, it's my responsibility to identify these blood and body fluids, as well as to analyze them and draw conclusions based on my analysis.

Q Can you give the ladies and gentlemen of the Jury some idea of your educational background and then your job experience in this field?

A I hold a Master's of Science Degree in Forensic Science from Virginia Commonwealth university in Richmond, Virginia. I also hold a Bachelor of Science Degree in Medical Technology from the Medical School at U.N.C., Chapel Hill. I have also had eighteen months of [56] intense training in the area of serology during that time.

MR. FORD: Judge, we will stipulate to her qualifications.

MR. VON SCHUCH: Judge, I would offer her as an expert in the area of serology at this time.

THE COURT: She is an expert.

BY MR. VON SCHUCH: (Continuing)

Q Ms. Schiermeier, can you tell the ladies and gentlemen of the Jury what we are talking about when we are talking about a person's blood type?

A When we speak of a person's blood type, you may be familiar with the A-B-O blood typing system, which is involved when you donate blood. The particular A-B-O system divides the population into four separate types, Type A, Type B, Type O, and Type AB. Now, similar to that system there are other systems that are inherited. You have them throughout your entire life and those systems are found in your blood and body fluids, specifically vaginal fluid and seminal fluid.

Q What are enzyme systems and how do they relate to the fluids that you've described for the Jury?

A Okay. When I mentioned we have other systems, these systems are based on enzymes in everybody's body. Everybody has these enzymes. It's just the form of [57] the enzyme, or what I will refer to as the type of the enzyme, is different in different people, and these types are inherited from your parents. You have them at birth. You will maintain those same types throughout your life and you will have them at your death.

Q Are these blood types and enzyme types secreted in your bodily fluids, such as saliva, such as seminal fluid?

A They are secreted into the blood. They are secreted into the vaginal fluid, as well as into the seminal fluid.

Q How do you identify blood types or enzyme types in fluids?

A I have some sophisticated techniques which I use within the laboratory. These techniques are common to not only the forensic laboratory, but they are also techniques that are used within a hospital laboratory. And based on these techniques and using the particular samples that I have, whether it be samples of blood, samples that I have identified seminal fluid on, I use those samples. I test those samples and then I come to a conclusion as to what the types are of that particular sample and then I compare those types to the known types of the individuals which were submitted to me.

Q Did you have occasion to have submitted to [58] you a physical evidence, or a PERK Kit, from Morris Keller and Mary Elizabeth Keller from Agent Joe Adcock?

A Yes. I received a Physical Evidence Recovery Kit, or PERK as an abbreviation. I received them from, one submitted to me as coming from Morris Keller, as well as one submitted to me as coming from Mary Keller. Those were submitted to me by Special Agent Adcock on March 5th of 1993.

Q Did you have occasion, as well, to receive the same type of substances, PERK Kits and so forth, from Jeffrey Cruse and Michael Williams, and I believe they would have been delivered by Officer Meinhard?

A Yes. I did receive samples from Mr. Cruse and Mr. Williams. I received those on the 17th of March of 1993.

Q Did you have occasion to type all of the items that you recovered in the PERK Kits?

A Yes. After I identified which particular fluids I was dealing with, I then attempted to type them, as I

explained to you earlier, and then I compared the types that my tests showed me to the known types of the individuals.

Q Did you have occasion to chart that?

A Yes. I prepared a chart in my report, which I released on this case, and I did also bring an overhead [59] form of the chart with me to court today.

Q What I would like to do is try and use the overhead so that the ladies and gentlemen of the Jury can clearly see what you have done, which means we need –

THE COURT: Need what?

MR. VON SCHUCH: The State Trooper who is going to help me set up the screen.

BY MR. VON SCHUCH: (Continuing)

Q While we are waiting on him, let me ask you this, Ms. Schiermeier. You indicated that you had occasion to make a lab report and chart your analysis; is that correct?

A Yes.

Q Do you have a copy of that with you?

A Yes. I have a copy of my three page report.

MR. VON SCHUCH: Judge, I would offer that at this time as a Commonwealth's exhibit.

THE COURT: Do you have two copies? We can't take your only copy.

THE WITNESS: I only have a copy for myself.

BY MR. VON SCHUCH: (Continuing)

Q Why don't you take a look at that? Let me see if that –

[60] A Okay. This appears to be a copy of the report that I issued in this case. A couple of the pages have been duplicated here, but it does bear my signature on the final page.

MR. VON SCHUCH: I would offer that.

THE COURT: Any objection?

MR. FORD: No objection, Judge.

THE COURT: That's *Commonwealth's Exhibit Forty-Two.*

BY MR. VON SCHUCH: (Continuing)

Q Can you tell the ladies and gentlemen of the Jury what you have done here? As I see, I see no blood types across there. Can you explain to them what the PGM, PGM subtype, and PepA are, please?

A Okay. This is a copy of the table which is in my report. Across the top "Table of Typing Results" of the evidence that I typed in this particular case. Underneath the "Item", which I have yet to uncover, will describe what the item was, what the item number was. And then the PGM, PGM subtype, and PepA, those are the system that I typed these particular samples in. PGM is an abbreviation for a long chemical name, phosphoglucomutase. We call it PGM for short. The PGM subtype is a subtype or a subset of the PGM. So the subtype is just a further [61] breakdown of the PGM type. And then lastly, PepA stands for peptidase A. Again, we use the abbreviation,

and it is another system in which I can type blood and body fluid samples in.

Now, these systems are inherited independently, and what I mean by that is that just because you are a particular type in one system does not predetermine what type you are in another system. So we use these systems to help describe or create a profile of the particular sample. For instance, if you were talking about a car, you might say it's a green car, it's a four-door, it's a Chevrolet. Well, with my particular typing system, I say that the particular sample is a PGM type whatever, subtype whatever, PepA type whatever, and those are descriptions as to what the sample is.

Q Did you have occasion to capture these systems from Morris Keller?

A Yes. On the known blood sample that was submitted to me from Morris Keller, the types I identified were PGM type 2-1, PGM subtype – Remember, I said subtype is just a breakdown of the PGM system – the subtype being a 2+1+, and the PepA type 1. Now, the numbers are what we use to describe what the type is. Where the A-B-O system used letters, these systems use numbers and plus and minus signs.

[62] Q Did you have occasion to do the same from the blood of Mary Elizabeth Keller?

A Yes. I also received a blood sample from Mary Keller and determined that the types were PGM type 2-1, subtype 2+1+, PepA type 1. Now, in looking at these two individuals, Mr. Keller and Mrs. Keller, you can see

across that they do have the same types in the systems that I typed across.

Q And who did you type next, please?

A The next sample I have listed, I got a blood sample from Mr. Cruse, and the types, you can see, are PGM type 2-1, subtype 2+1-, PepA type 1. And you can see by looking across there that there is a difference in types in this PGM subtyping system. Mr. Cruse is a 2+1-, whereas both of the Kellers are 2+1+, and, therefore, I can distinguish Mr. Cruse from Mr. and Mrs. Keller.

Q Did you have occasion to type the defendant in this case, Michael Williams?

A Yes. I received a blood sample from Mr. Williams. The types you see are the PGM type 2-1, subtype 2-1+, PepA type 1. Now, in looking at all the four individuals involved, they all have the same PGM type, they all have the same PepA type, but this PGM subtyping system I can use to distinguish between the individuals in the case.

[63] Q In this case, Michael Williams has a different PGM subtype than any of the other three?

A That is correct.

Q Did you have occasion to analyze the vaginal swabs taken by the medical examiner from the vaginal vault of Mary Elizabeth Keller?

A Yes. I examined the vaginal swabs and the vaginal smear from Mrs. Keller, and on those I identified spermatozoa, which is the male reproductive cell.

Q Did you have occasion to type the fluids that you found on those vaginal swabs?

A Yes. Because I did identify spermatozoa, that also means that there was seminal fluid present, because seminal fluid is made up of a fluid portion and a sperm portion. And in these systems that I test for, to get very technical, I am testing that fluid portion on the vaginal swabs. Now, the vaginal swabs, being that they were taken from the vaginal area, I can expect for there to be vaginal fluid from Mrs. Keller there, just because of where those swabs were taken from. I also identified spermatozoa, which means that those swabs are a mixture of vaginal fluid and seminal fluid. And you can see that the types I determined were PGM type 2-1, subtype 2+2-1+, and PepA type 1. Now, this 2+2-1+ is the mixture. And when I compare these types back to the known individuals in the [64] case, the first thing I do is I look for something, I look for a type foreign to Mrs. Keller, because, remember, we said that there is vaginal fluid there. So in comparing this back to Mrs. Keller, the 2- is foreign. Mrs. Keller is a 2+1+. She is not capable of producing a 2-. So in looking at the individuals, from whom I have blood samples for, this 2- could have come from Mr. Williams. This 2- could not have come from Mr. Cruse. It could not have come from Mr. Keller. Therefore, my conclusion would be that if there was one donor of the seminal fluid, what I refer to in my report as a sole donor of the seminal fluid, Mr. Williams cannot be eliminated. However, if there were more than one donor of that seminal fluid, we've already said Mr. Williams cannot eliminated, but if there was more than one donor, Mr. Cruse and Mr. Keller could not be eliminated.

Q Between those four people, the only one up there that has a 2- is who?

A Mr. Williams.

Q The vaginal swabs captured 2-. Between those four people, the only one up there who could have deposited that 2- in the vaginal vault of Mary Elizabeth Keller would have been who?

A Mr. Williams.

Q Let me ask you, Ms. Schiermeier, what you [65] are capturing is from fluids; is that correct?

A That's correct.

Q When DNA testing is done, are they examining the same things or the same substances or same materials you are, or are they examining different materials?

A DNA is examining cells. And remember I said that spermatozoa is the male reproductive cell. While technically we both tested the seminal fluid, I tested the fluid portion of the seminal fluid and DNA tests the sperm section of the seminal fluid. So there are those two. There is that distinguishing factor in there that I tested the fluid portion; DNA tested the sperm or the cellular portion.

Q The items that you had occasion to examine to obtain these results, what did you do with them after you completed your analysis of the materials you specifically were looking at?

A After I completed my analysis of these particular items, I then forwarded them to our DNA section for further analysis.

Q Just briefly, what is DNA testing, because we've used that term and I'm not sure whether the Jury understands it?

A DNA testing is a more – if I may back up. DNA is more specific. When I do my serology testing, it [66] breaks down the population into categories. Some systems may have three categories, some systems may have ten categories, but DNA testing divides the population into many, many different types. So it is a much more discriminative process than just the serology work that I did.

MR. VON SCHUCH: I'm going to leave that up, because I don't know whether Mr. Ford has any questions pursuant to it. Do you need the chart for the Jury?

MR. FORD: No.

MR. VON SCHUCH: Judge, at this time I would offer the creation of the overhead into evidence as a Commonwealth's exhibit. I think at this time she can resume her chair and Mr. Ford can cross examine her.

MR. FORD: Isn't that the same as the report?

MR. VON SCHUCH: It is. Do you have any objection to that not being admitted?

MR. FORD: No. That's fine.

THE COURT: You had this in your report?

THE WITNESS: That is the same chart that is in my report.

[67] CROSS EXAMINATION

BY MR. FORD:

Q Ms. Schiermeier, you mentioned about DNA –

A Uh-huh.

Q – and that you had sent the tests or you had sent the specimens on for DNA testing?

A Right.

Q Is DNA testing a more exact science than yours is? I mean, can DNA typify somebody a lot closer than you can?

A Generally speaking, yes, but I am not an expert in DNA.

Q I understand that. But when you give us your report, you mention donors. So what you are saying is that Mr. Williams has a type that is common to several hundreds of thousands of people, I would guess, or quite a few people?

A That type that I determined on the overhead, I believe it was a 2-1+, that is common to a portion of the population, and if you prefer I could dig out the statistics.

Q No, I don't need the statistics.

A Okay.

Q There's just a lot of people that have that?

[68] A There are people, other people, yes, that do have that same type.

Q And DNA is a more exact science in that if it can determine so, it can determine whether someone is a

contributor down to an infinitesimal amount; isn't that correct?

A It is possible, but, again, I am not a DNA expert.

MR. FORD: Thank you, that's all I have.

THE COURT: May this lady be excused?

MR. VON SCHUCH: Yes, sir. She may be excused.

THE COURT: You may be excused. Thank you.

MR. FORD: Judge, one more quick question.

THE COURT: All right.

BY MR. FORD: (Continuing)

Q Would contaminants play any part in your evaluation? If a body was left out over a certain period of time, would that affect your findings?

A What is possible in that particular situation is that I would not get a result. I determined that the type of the vaginal swabs were the 2+2-1+. If that were a problem, I would not determine a type. It would affect the test so that I would not see a result and [69] I would call it inconclusive, and there is no other way for it to change a result or anything like that. I would not get a result.

MR. FORD: No further questions.

THE COURT: Thank you. You may be excused.

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

* * *

[77] The witness, GEORGE C. LI having first been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Would you give the ladies and gentlemen of the Jury your name, please?

A My name is George Li.

Q And, Mr. Li, let me ask you this, are you employed, sir?

A Yes, sir.

Q Where and in what capacity?

A I'm employed at the Virginia Division of Forensic Science, commonly known as the crime lab. I'm employed as a forensic scientist supervisor. My duties involve supervision of serologists and DNA analysts who analyze criminal casework in the Richmond laboratory, as well as I myself do conduct DNA analysis on casework as well.

Q Can you give the ladies and gentlemen of the Jury your educational experience?

MR. FORD: We'll stipulate to his qualifications as a DNA expert.

THE COURT: You stipulate that he is an expert in that field. The Court so rules.

[78] BY MR. VON SCHUCH: (Continuing)

Q Mr. Li, can you indicate to the ladies and gentlemen of the Jury what DNA PCR testing is, please?

A DNA PCR testing is, again, a technique that utilizes the fact that people are different in their DNA. PCR actually stands for Preliminary Chain Reaction. It is a technique that, in essence, multiply the difference that is in our DNA to an extent that we can see it as a color reaction. It's a series of dots that indicates to me the difference between people, and using that I make a comparison to try to associate evidence to known samples or make a differentiation to tell things apart.

Q Did you have occasion to receive from Bob Scanlon, after he'd finished the RFLP testing on the items, the PERK kit from Morris Keller and Mary Elizabeth Keller?

A I received cuttings and known samples from Bob Scanlon.

Q Did you have occasion to receive the same thing concerning Jeffrey Cruse and the defendant in this case, Michael Wayne Williams?

A Yes, I did.

Q Did you have occasion to receive the vaginal swabs or the material extracted from the vaginal swabs of Mary Elizabeth Keller?

A Yes, I did.

[79] Q Now, did you have occasion to conduct at that time an amplified PCR DNA testing on all those materials?

A Yes. That's the test that I conducted on those evidence that was mentioned.

Q Did you get some results as a result of the tests that you ran?

A Yes, I did. I received results.

Q Can you explain to the ladies and gentlemen of the Jury or demonstrate for them exactly what you received, please? Would you like to use the overhead at this point?

A Yes, please.

THE COURT: The Court is going to move over and you may move over there.

MR. FORD: Thank you, Judge.

THE WITNESS: Your question was the technique?

BY MR. VON SCHUCH: (Continuing)

Q Yes. What I want you to do is to explain the results that you got from the testing on each one of these samples and the conclusions that you drew as a result of that.

A I conducted a DNA PCR testing on the [80] evidence, which is the known blood sample of Morris Keller, Mary Keller, Jeffrey Cruse, Michael Williams, and the

vaginal/cervical swab, which is actually one swab of the vaginal/cervical area of the victim.

Q Could you keep your voice up so that the ladies and gentlemen in the back row can hear?

A Okay. I conducted the PCR test and the results are shown as series of dots on a strip. The strip is actually a piece of nylon strip. The results were indicated by blue dots on this piece of nylon strip. This is what a blank strip would look like with a series of blanks, and the result would be indicated by blue dots on these. The location of the blue dots would tell me what type the person is, or the piece of evidence is indicating. In a sense somewhat similar to the A-B-O blood type, there is Type A, Type B, Type AB, and Type O, so for the A-B-O system there is four types. For this PCR testing there are twenty-one types, the types indicated by numbers. The choice of the numbers are 1.1, 1.2, 1.3, 2, 3, 4. A person's type is indicated by two of these six numbers.

My PCR type happens to be 3, 4. So George Li's PCR type is 3, 4. That is my PCR type. Another person's type could be 1.1, 1.2 or whatever that person's type happens to be, but it is indicated by these two numbers, that person's type. And the dots, depending which [81] one is lit up or is colored, will tell me what type that person is. In this particular case, Morris Keller's type is as follows. I'll give you the type of each of the individuals that I conducted a test on.

Q Yes, Mr. Li.

A There's four different individual's known samples that I tested. The type was actually 1.2, 3, is Morris

Keller's type. The dots actually looks like this as they are lit up.

Q Could you center that, please?

A So this is Mr. Keller's type, 1.2, 3, these dots that lit up, as we call it, they light up. And Mary Keller's type, her type is 1.1, 2. Now, to use as an example, I can tell these people apart because their types are different. From the fact that the dots light up differently, I can tell these people apart. If they happen to have the same type, I would not be able to tell them apart. If they happen to have the same type and the same dots light up, then I can't tell Morris Keller's blood from Mary Keller's blood or other body fluids. This technique works on blood and, in theory, any part of the human body that contains the nucleus, because the DNA is inside the nucleus, any part. Muscles would work; skin. Well, skin probably won't because it's a lot of dead cells. But brain cells would work with this technique, a small quantity, [82] too. This PCR test is extremely sensitive. It needs a very small quantity of sample to produce a result. It is extremely sensitive compared to the RFLP test and also to an enzyme typing, too. Now, that's Mary Keller's type and Morris Keller's type.

Q Mr. Li, when you refer to these lights, or these circles lighting up, when you watch the board with the test results, is that when these circles are shown?

A At the end of the test this is what I see as the final step of developing the results, if you will, to tell me what type the person is or the stain, which the vaginal/cervical swab would show a series of dots as well. After I have all

the known samples and the evidence, I make a comparison of the evidence to that of the known individuals. Mr. Cruse's type is 1.1, 4 and Mr. Williams' type is 1.2, 4. Now, in this particular case all four individuals in this case are different, show a different type. In this instance, I can tell them all apart. In other cases it may be just by chance, because there is only a choice of twenty-one different types. It is possible that people share the same PCR type and in those instances I won't be able to tell people apart. But in this case every individual has a different PCR type and I can differentiate all four of them to an extent.

Now, this is what I got from the vaginal, [83] the type that I have and the dots that's lit up are as follows. The dots that lit up is these and the type, if I was just reading the dots on its own merit, these are the dots that light up and they would mean to me a type of 1.1, 4. This is what the type would indicate to me, if I knew nothing else about the case in question. Now, this result is different from that, 1.1, 4 is different from that of Mr. Keller and Mary Keller. So the sperm that is present there is not from Mr. Keller, because he being her husband, we need his known type to make sure that the sperm there isn't his or if it was, and I want to make sure we can tell that, whether it is or not. But it is not from Mr. Keller. That settled that one question. The other question would be the other individuals in question, Mr. Cruse and Mr. Williams. If this came from only one sperm source, meaning only one person ejaculated and the sperm came from only one individual, then this type could only have come from Mr. Cruse and not Mr. Williams, if the sperm only came from one source, one individual, because this type

is different. Mr. Williams' type is different from this, if there was only one sperm source.

But if the question was if there was more than one donor of semen, if this came from more than one individual, the sperm that is present here, these dots is consistent with the additional, these dots plus these dots [84] would still light up the same ones. These two together, these two are blank. This is blank and these two are blank. This is blank. These two light up. This one lights up. This one lit up, although Mr. Williams' was blank here, the dot would light up here. These two would both light up here and these last ones here. So if there was more than one donor of the semen, this is consistent with the – This stain could have been donated by two individuals that have these types together, will result in these series of dots.

Q When you talk about Mr. Cruse, is there anything about Mr. Cruse which would cover up the donation of Michael Williams in the final result?

A This result indicates a type of 1.1, 4. but I will not be able to tell you that this is here or not, because the presence of these dots would cover up the presence of this other individual if this person happens to by these types.

Q If the evidence, for the Jury were that both Jeffrey Cruse and Michael Williams jointly deposited seminal fluid, is this exactly the result you would get from that joint deposit?

A This result would be consistent with such a scenario.

Q That's all the questions I have. Mr. Li. do [85] you have a lab report?

A I generated a report of this particular case.

Q I'm going to ask you to take a look at this and see if you can identify that.

A Yes. This is a copy of the report that was generated in this particular case.

Q Let me ask you this. That auto-read that you have just produced there –

MR. VON SCHUCH: Judge, I would offer that at this time, because I think it very clearly explains the situation. I would offer that as a Commonwealth's exhibit at this time.

THE COURT: Exhibit Forty-Three.

MR. VON SCHUCH: Yes.

* * *

[86] CROSS EXAMINATION

BY MR. FORD:

Q Mr. Li, you can stay down there if you want to. I have just a couple of questions.

A Right.

Q I believe it's your testimony though that the specimen that you got is exactly consistent with J. Cruse; is that right?

A If it came from one semen donor, yes. It would be correct to say it is the same as a person that has this type,

but it so happens that Mr. Cruse is this type. That would be the correct way to say that.

Q So all this would be based upon whether the evidence showed that there were two or one individuals contributing to that; is that right?

A If this came from one individual –

Q Then Mr. Cruse –

A – then Mr. Cruse –

Q – is the man?

A If it's only one individual, then it did not come from this person.

MR. FORD: Thank you.

[87] MR. VON SCHUCH: Is that all you have?

MR. FORD: Yes.

MR. VON SCHUCH: Judge, I would offer this at this time, and if it's okay with Mr. Li, what we will do is during the break we will go ahead and provide him with the copy. We need to produce a copy that can be substituted for this.

THE COURT: Is that all right with you?

THE WITNESS: That will be fine, sir. Am I excused?

THE COURT: *Commonwealth's Exhibit Forty-Three.*

THE WITNESS: Am I excused, sir?

MR. VON SCHUCH: Judge, we have no further questions for Mr. Li.

THE COURT: You may excused, sir, and you may go.

• • •

COMMONWEALTH'S EXHIBIT 42

Commonwealth of Virginia
Department of General Services
DIVISION OF FORENSIC SCIENCE

(LOGO)

CERTIFICATE OF ANALYSIS

April 30, 1993

ORIGINAL

Central Laboratory
P. O. Box 999
Richmond, Virginia 23208

Tel. No.: (804) 786-4707
Fax: (804) 371-8328
TDD/Voice (804) 786-6152

TO: ATTN J H ADCOCK
DEPARTMENT OF STATE POLICE
P O BOX 577
APPOMATTOX VA 24522

Your Case # 93-83-00-0103 FS Lab # CL93-2111

Victim(s): KELLER, Morris Clifford, Jr.
KELLER, Mary Elizabeth

Suspect(s): WILLIAMS, Michael Wayne
CRUSE, Jeffery Alan

Evidence Submitted By: J. H. Adcock & W. Hipkins
Date Received: 3-3-93

Item 9 – Leaf with stain
Item 20 – Clothing from Morris Keller
Item 21 – Clothing from Mary Keller

Evidence Submitted By: J. H. Adcock
Date Received: 3-5-93

Items 26 and 27 – Physical Evidence Recovery Kit from Morris Keller
Item 28 – Physical Evidence Recovery Kit from Mary Keller

Evidence Submitted By: Claude Meinhard
Date Received: 3-17-93

Item 41 – Blood, Saliva, and Hair Samples Kit from J. Cruse
Item 42 – Physical Evidence Recovery Kit (#2496) from M. Williams

RESULTS:

Item 9 – Chemical tests indicated the presence of blood on the leaf; however, no results were obtained in the test to determine human specie.

Items 20 and 21 – Per instructions from S/A Tyree on 3/15/93, no serological examinations were conducted on the clothing from Morris or Mary Keller. The clothing was forwarded for hair/fiber examination.

Items 26 and 27 – No spermatozoa were identified on the oral or anal smears from Morris Keller and no seminal fluid was detected on the corresponding swabs. Chemical tests indicated the presence of blood on the oral swabs. No hairs/fibers or apparent tissue was noted in either of the hand bags and the head hair exemplars were forwarded for comparison purposes. Chemical tests indicated the presence of blood, insufficient for further testing, in the right hand bag. No blood was noted in the left hand bag.

Refer to the Table for typing results on the blood sample from Morris Keller.

Item 28 – Spermatozoa were identified on the vaginal smears from Mary Keller. Refer to the Table for typing results on the corresponding swabs and the blood sample from Mary Keller. No spermatozoa were identified on the anal smear and no seminal fluid was detected on the corresponding swabs.

Item 41 – Refer to the Table for typing results on the blood sample from J. Cruse. The hair exemplars were forwarded for comparison purposes and the saliva swabs were not examined.

Item 42 – Refer to the Table for typing results on the blood sample from M. Williams. The hair exemplars were forwarded for comparison purposes. The saliva swabs and lips/lip area swabs and smear were not examined.

TABLE OF TYPING RESULTS

Item		PGM	PGM subtype	PepA
27	Morris Keller	2-1	2+1+	1
28	Mary Keller	2-1	2+1+	1
41	J. Cruse	2-1	2+1-	1
42	M. Williams	2-1	2-1+	1
28	Vaginal swabs from Mary Keller	2-1	2+2-1+	1

Commonwealth of Virginia
Department of General Services
DIVISION OF FORENSIC SCIENCE

(LOGO) ORIGINAL

CERTIFICATE OF ANALYSIS

DEPARTMENT OF STATE POLICE
Your Case # 93-83-00-0103
FS Lab # CL93-2111
April 30, 1993

CONCLUSIONS:

Based on the above results, M. Williams cannot be eliminated as the sole donor of the seminal fluid identified on the vaginal swabs from Mary Keller. However, if there was more than one donor, J. Cruse and Morris Keller cannot be eliminated as co-contributors to the stain.

The evidence will be available for pick-up after you have received the results of all requested examinations, which are contained in separate reports.

ATTEST:

I certify that I performed the above analysis or examination as an employee of the Division of Forensic Science and that the above is an accurate record of the results of that analysis or examination.

/s/ Lisa C. Schiermeier
Lisa C. Schiermeier
Forensic Scientist

1.1 1.2 1.3 2 3 4

3, 4

COMMONWEALTH'S
EXHIBIT
43

Morris K 1.2, 3

Mary K 1.1, 2

J. Cruse 1.1, 4

M. Williams 1.2, 4

Vagard/Gordon Smith 1.1, 4

Supreme Court, U.S.
FILED
NOV 23 1999
OFFICE OF THE CLERK

No. 99-6615

In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

vs.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON, WAVERLY VIRGINIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX
VOLUME II, PAGES 215 TO 428

BARBARA L. HARTUNG*
1001 E. Main Street
Suite 504
Richmond, Virginia 23219
Telephone: (804) 649-1088

JAMES E. MOORE
CHRISTIAN & BARTON, L.L.P.
909 E. Main Street
Suite 1200
Richmond, Virginia 23219
Telephone: (804) 697-4100

Counsel for Petitioner

**Counsel of Record*

MARK L. EARLEY
Attorney General
DONALD R. CURRY*
Senior Assistant
Attorney General

Office of the Attorney
General of Virginia
900 E. Main Street
Richmond, Virginia 23219
Telephone: (804) 786-4856

Counsel for Respondent

Petition For Certiorari Filed October 18, 1999
Certiorari Granted October 28, 1999

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

* * *

[145] The witness, SPECIAL AGENT J. RICHARD HOLT, having first been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Good afternoon. Would you give the ladies and gentlemen of the jury, please – and would you speak loud enough all the way back here so this gentleman back here can hear your please, sir? Give them your name, please.

A My name is John Richard Holt, H-o-l-t.

Q And, Agent Holt, are you employed, sir?

A Yes, I am.

Q Where and in what capacity?

A I'm employed by the Virginia State police as a Special Agent currently assigned to the Violent Crimes Investigative Unit.

Q Were you so employed in the first week of March of 1993?

[146] A Yes, sir, I was.

Q Did you have occasion to become aware of where and when the defendant in this case, Michael Williams, was arrested?

A Yes, sir.

Q Where was that?

A That was in Camden County, Georgia.

Q And approximately when was that?

A It was March 4, 1993.

Q As a result of that, did you have occasion to respond down to Georgia to return him to the State of Virginia?

A Yes, sir, I did.

Q Now, let me ask you, how was he transported back to Virginia?

A He was transported in a Cumberland County Sheriff's Office vehicle with Deputy Danny Henshaw and myself.

Q On the way back, did the defendant ask you certain questions?

A Yes, sir, he did.

Q Did you answer those questions?

A Yes, sir, to the best of my knowledge.

Q Did there come a point in time on the way back, while you were in the care when the defendant asked [147] you what did Jeffrey Cruse say to the police?

A Yes, he did.

Q And what did you tell him at that point?

A I told him that Jeff had been interviewed and he had told us the whole story –

MR. FORD: Objection, Judge, to his characterizing what Mr. Cruse says was the whole story. That's conclusary on his part.

MR. VON SCHUCH: Judge, I've asked him simply what he told Mr. Williams.

MR. FORD: I would object to the characterization of the whole story, it implies to the Jury that Mr. Cruse was honest in this particular case, and I don't think that's the case.

MR. VON SCHUCH: Judge, he's not saying what Mr. Cruse said. He's saying what he told him.

THE COURT: He told him Mr. Cruse had told them the whole story. Now, whether or not that's correct or not, we don't know.

BY MR. VON SCHUCH: (Continuing)

Q I'm sorry. Would you go ahead? What did you tell Michael Williams when he asked you that question?

[148] A I told Michael Williams that Jeffrey Cruse had been interviewed and he had told us the whole story, from the time he first met Michael until the last time he saw him.

Q And what did the defendant respond when you told him that?

A Prior to him making another statement, I told him that the .357 Ruger Black Hawk had been recovered by the State Police from the Rappahannock River, and he quickly stated –

MR. FORD: Judge, I want to again object. I think we are getting into hearsay matters now and I'd like to ask –

THE COURT: Hearsay from the defendant?

MR. FORD: Well, I'd like to ask the Court to review what he is going to say, outside the presence of the Jury, to make sure that it's against his penal interest and falls in the exceptions.

THE COURT: All right.

MR. FORD: If the Judge so rules, then he can say that.

THE COURT: Ladies and gentlemen –

(The Jury retired to the Jury room.)

[149] MR. FORD: I appreciate the Court accommodating me.

BY MR. VON SCHUCH: (Continuing)

Q Officer Holt, I think you were just about to the point where you were going to tell us that after you had told Mr. Williams that Mr. Cruse had told you the whole story, and outlined that, would you indicate to the Court exactly what Mr. Cruse (sic) responded at that point?

A He said, "I can prove that Jeff had that goddamn Black Hawk."

MR. VON SCHUCH: That would be all the questions that I have of him concerning Mr. Williams' statements.

MR. FORD: I don't see where that's against his penal interest at this point and I don't think it's admissible.

THE COURT: I think it is against the penal interest that he knew about the Black Hawk gun and so forth, one of the murder weapons.

MR. FORD: All right. Note our exception, Judge.

THE COURT: Bring the Jury in.

[150] (The Jury returned to the Courtroom, and in the presence of the defendant and counsel, the following ensued.)

BY MR. VON SCHUCH: (Continuing)

Q Trooper Holt, there was a point in time on the way back when Mr. Williams asked you a question, "What did Jeff say?" And I believe you had just told the Jury what you had responded to Mr. Williams; is that correct?

A That's correct.

Q What did Mr. Williams say after you made those statements to him?

A He said, "I can prove Jeff had that goddamn Black Hawk."

Q Now, let me show you a jacket.

THE COURT: What exhibit is it?

BY MR. VON SCHUCH: (Continuing)

Q I'm sorry. It's tagged as Commonwealth's Exhibit Number Eleven. I'm going to show you that and ask you if you can identify that, please.

A It appears to be the jacket he was wearing when he was transported back from Georgia to Virginia.

Q That's the jacket he had on when you brought him back?

A I didn't mark it or label it at that time, [151] but it appears to be the same type jacket, same collar, same sleeve, same feel.

MR. VON SCHUCH: That's all the questions I have.

CROSS EXAMINATION

BY MR. FORD:

Q When you said that you told Michael that Jeff Cruse had told you the whole story, that was just your version, right? I mean, you don't know anything about the case other than what – you weren't involved in the case as far as anything else but going down and picking him up; is that right?

A I had interviewed Jeff Cruse prior to going down there.

Q Okay. But you're not trying to tell us that what Cruse was telling you was the absolute truth? You don't know that for a fact, do you?

A No, sir.

MR. FORD: No further questions.

THE COURT: You may step down and you may be excused, sir.

MR. WOODSON: The Commonwealth rests, Your Honor.

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

* * *

[165] The witness, MICHAEL WAYNE WILLIAMS, having first been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. FORD:

Q Michael, would you state your name for the Court and the Jury, please?

A Michael Wayne Williams.

Q How old are you?

A Twenty-five.

Q Have you lived in Cumberland County?

A Yes, sir.

Q About how long have you lived in Cumberland?

A I've lived here, really, all my life.

Q Do you know Jeffrey Alan Cruse?

A I met him like a month before the incident took place.

[166] Q So sometime in January?

A Yes, sir, sometime in January.

Q Directing your attention to February 27th of '93, did you have occasion to be with Jeff Cruse at that point?

A I was at the Lozano residence and we were all sitting around drinking and partying and all.

Q This is you and Jeff Cruse and Mr. Lozano?

A Yeah. I mean, sitting around drinking and smoking pot and getting messed up. Then we left there and we went to a bar in Farmville, J. R.'s Pool Room. I don't know. We drank a lot of beer. I don't know how much. It was a whole lot. And then we left there and we came back and we drank more beer.

Q Came back to where; where did you go?

A To the Lozano residence.

Q And who was with you at that point in time?

A It was me, Jeff, and Albert. I mean, we were sitting around drinking. Me and Jeff went upstairs. We were up there by ourselves talking. I mean, we were sitting there discussing and all that and just talking.

Q Discussing all of what?

A We decided we were going to do a robbery.

Q You decided, you and Mr. Cruse? Were you and Mr. Cruse participating in that discussion?

[167] A Yes.

Q Did Mr. Cruse actively participate or did he not want to do that?

A I mean, he actively participated. And we were sitting there trying to figure out where to go and rob, and I told him there was a store on Bear Creek Road that I knew. I mean, it was in the middle of nowhere and we could rob it. It was my idea to go to the store.

Q Because Mr. Cruse wasn't from this area; is that right?

A Exactly.

Q Who took you there; how did you get there?

A Verena Lozano. We got a ride from her, and she drove me to my house and I got a jacket and put it on and come out of there and got back in the car and I directed her to the end of a dirt road and 622. I don't know the road number of the dirt road.

Q Now, let me back up just a little bit. Did either you or Mr. Cruse have a weapon at this point in time?

A Jeff Cruse had a .357 Magnum Black Hawk.

Q And where did he get that weapon from?

A I gave it to him.

Q Now, you were dropped off by Ms. James; is that correct?

[168] A Yeah.

Q And what did you do? Did she leave?

A She didn't have anything to do with it. She just dropped us off right there. She had her kid with her. I mean, she just dropped us off right there and she drove on. I told her I was going to my uncle's house so she wouldn't think we were going to rob the store. And, I mean, then we walked up there like at the edge of the woods, or really we were in the road. If a car came, we'd like hide from the car so nobody could see us.

Q I understand.

A Well, then we got to the store and as soon as we got to the store, the people were getting in their cars. The lights were out. They were already closed.

Q Who had the weapon; who had the .357?

A Jeff Cruse had the weapon at this time. Then when we left there, we were sitting there. We didn't have a car; we were walking. So we left there and we were walking and we were sitting there. So we said, well, we don't have – I mean, we didn't have a ride, so we just started walking. I know people in the area, because I grew up down in that area.

Q Yes.

A So I figured, well, we could walk this way, because I know people and, I mean, maybe somebody would be [169] home or something and we could stop and get a ride from them. So we were walking or whatever and we got to talking or whatever and we decided that we would rob a house.

Q Who decided that you would rob a house?

A Well, really, we were both.

Q Mr. Cruse actively participated in that discussion?

A Yes, he did. I mean, when we were walking, like every house we got to, all the houses through there are right on the road. So when were walking down the road, we finally got to the Keller residence and their house was way off the road, I mean.

Q Did you know the Kellers?

A I didn't know them personally. I knew who they were. But, I mean, that was the first house we got to that was way off the road and you couldn't see from the road. It wasn't planned to go there. Bear Creek Market was the plan to go to. I mean, it was just that was the house that was off the road.

Q Now, you said that you didn't know the Kellers personally?

A No, sir.

Q But you grew up –

A Right down the road from them. I mean, his brother had picked me up hitchhiking before or something [170] like that, but I did not know them.

Q So you approached the house?

A Huh?

Q Did you approach the house?

A We approached the house and they had a Jeep Cherokee setting in the front yard. We walked up and stood behind that and watched and it was only them two home.

Q Who has the weapon?

A Jeff has the weapon still at this time. We decided that we'd knock on the door and ask to use the phone. So when we got up to the door, we both knocked on the door. And when we knocked on the door, that's when Jeff handed me the gun, and when he handed me the gun, I just took the gun and he said, "I'll walk in first and you walk in behind me." So, I mean, I had the gun in my hand

at this time the .357, and when he answered the door, I said, "Can we use your phone," and he said, "if you'll give me the number, I'll call it for you." Well, when he said that, Jeff walked right in.

Q Just walked in?

A Yes.

Q Did he brush by Mr. Keller?

A By Mr. Keller. Mrs. Keller was standing in the kitchen. She couldn't see us at the time. Then I walked in right behind him and led him to the kitchen where [171] Mrs. Keller was, and I told them both to sit down. And when I told them to sit down, I turned around and Jeff was going back down the hallway to search the house. So he had already started?

A Yes.

Q Had you told him to go? I mean, did you tell him to go?

A I did not tell him. He did all this on his own free will. I didn't make him do anything.

Q All right.

A Then when he went back there, while he was searching the house, he found some .38 shells and he came up there and he asked them, he said where was the .38 at, because he said, "I've got .38 shells here." Then Kippy Keller said, "It's on top of the dresser." It was a tall dresser, so Jeff hadn't seen it. And he said on top of the dresser, so Jeff went in there and got it and come back up there and said, "It's a fully loaded .38." And I said, "Well,

look, that's a loaded gun, a fully loaded." I said, "Let me have that since I'm watching them and you be searching the house back there." So we switched, and so I had a loaded gun, watching them, instead of just two bullets. The .357 had two bullets in it. I gave that to him. So he went on back to the back and was searching the house. While he was searching the house back there, I [172] mean, be searched for about, I'd say, fifteen minutes. And, I mean, like we were talking back and forth, but, I mean, I can't recall the conversation. All it was like, "Have you found anything yet," or something like that.

Q Was he bringing anything into the area where you were with him or was he just –

A No. He was just looking for money. I mean, that's – When be finally came back out, he had the back – The back bedroom had a phone in it and he had the phone cord and he said be was going to tie them up, and he tied Mrs. Keller up first and after he tied her up, he didn't have any phone cord, so he snatched the phone cord off the kitchen phone and he tied –

Q Were they dressed or undressed at that point?

A They were still dressed at that point.

Q When he tied them up?

A When he tied them up, he drug them to the closet right there and he emptied the closet out and he put them in the closet.

Q Now, what was in the closet?

A Them guns and some clothes, and we laid them on the couch in the living room. After we did that, he put

them in the closet. When he put them in the closet, after they were in the closet, tied up, that's when we [173] loaded the truck up.

Q Who got the truck? Is it the Jeep?

A Yeah. Jeff went outside and backed it up to the side door. The house had three doors.

Q Did you have the keys or how did you –

A The keys were laying on the counter to the Jeep.

Q So Mr. Cruse went outside and got the Jeep?

A He got the Jeep, pulled it around to the side and backed up to the door and came back in and then we both loaded the truck down.

Q Did you have the .38 at that point?

A Yeah. I still had the .38 at this point. And, I mean, then we loaded it down. After we was finished loading it down, we came back in the house. And then Jeff Cruse said he wanted to rape her. I said, "It's not a very good idea. DNA will pick it up." I said, "If you rape her, they're going to know who you are," and all that. He proceeded to do it anyway. He went to the closet. He pulled her out the closet and took her to the back bedroom closet.

Q Did you follow him back there?

A No, I did not. I was in the kitchen. Then he came back up front and we were just standing there talking. It's been so long I don't remember the [174] conversation that took place then. We were just standing there talking. Then he went back to the bedroom. I didn't see him rape

her. He said he raped her. I did not go back to the bedroom. They had a picture window like in the front window.

Q What were you doing while he was back there?

A I was standing there watching the driveway in case any cars pulled in.

Q After he got back out, then what happened?

A What was that?

Q After he got back from the back bedroom, then what happened?

A That's when he came back up from the back bedroom with Mrs. Keller, got Mr. Keller out of the closet, untied him, and that's when I said, "Well, let's walk back in the woods and leave them by a creek back there," because I had been hunting back there. I grew up there. I knew there was a creek back there. I said we would leave them by the creek and run back up there and leave and we'd be out of town before they could make their phone call.

Q Now, when you say "leave them by the creek," were you intending to shoot them at that point in time?

A No, we were not. We were going to leave them back there and then run and get in the truck and pull off and we could be away from everything before they called [175] the cops. Then after that, I mean, we got back there. We walked back around behind the house and we stopped. We told her we were going to burn the house down and she said, "Can I get my marriage license?" I told her, I said, I mean, "Yes, you can get your marriage

license," and I walked her back inside and got her marriage license with her and walked her back outside and we walked around behind the house and it was like an air condition unit, like a heat pump thing on the back of the house. We stood there for a minute and I used the bathroom and Jeff did, too, and then we walked them back there in the woods. After we got back in the woods –

Q Tell me how they walked back. Who was first, who was second?

A I was first.

Q You were first?

A Yes, I was.

Q How about Mr. and Mrs. Keller, where were they?

A Mr. and Mrs. Keller were side by side.

Q And where was Mr. Cruse?

A And Mr. Cruse was like a couple of steps behind me. Then we walked back there. After we got back there, we were sitting there. We were, you know, talking or whatever and he mentioned that, I mean, that they'd be [176] witnesses or whatever and, I meant I said, "Yes, they will be witnesses." We both agreed that they'd be witnesses.

Q So Mr. Cruse brought up the fact about witnesses; is that right?

A Yes, he did.

Q Okay.

A I agreed with him after he said it. I mean, we both agreed they'd be witnesses. So, I mean, we come up with the theory to count to three, just like he said, and I counted to three just like he said. And when I counted to three, I shot, and I shot Mr. Keller and he fell to the ground.

Q Let's back up just a little bit. How were you lined up in the thicket, I guess, or the woods?

A I was right here. Jeff Cruse was on my right. Mrs. Keller was in front of him and Mr. Keller was in front of me, just like he said.

Q At that point in time, what weapon did you have?

A The .38.

Q And what weapon did Mr. Cruse have?

A The .357.

Q Did Mr. Cruse indicate any reluctance to do any of this?

A No, he did not.

[177] Q Go ahead. What happened?

A Mr. Keller was right there. When I shot him, he fell to the ground. When he fell to the ground – Well, I mean, it was like bamm, bamm. I mean, it was like both of the guns went off or whatever.

Q Did you have to look at Mr. Cruse to –

A It was like a bamm and when I was turning he was already shooting. I mean, it was bamm, bamm, and

then she fell and they were both laying on the ground. I said, "All right, let me get my gun back," because, I mean, the .357 I had and, I mean, the only reason I'd switched was because I was watching them in the kitchen and I wanted the loaded gun, and I'd switched. I said, "Well, let me get my gun back," and when I got my gun back, while he was pulling my gun, the .38, I mean, out of my hand, when he was pulling it out of my hand, we heard a ruckus, like leaves rattling around, and Mr. Keller was standing back up and be looked at us. And when we turned around, when he was standing up, I jumped back and when I jumped back, that's when Jeff walked forward and I watched his arm raise up, but that's when I backed off. I mean, I heard a shot go off and I heard other shots go off.

Q How many shots; do you remember?

A I do not remember how many shots. I know that the paperwork that I got and all said that seven or [178] eight shots were fired, but I don't know how many shots were fired at the time.

Q You can't remember how many shots were fired?

A Not I don't. Then we got back up on the road and he was loading – he got the shells out the .38 and he was loading it back, because he had a pocket full of shells, and he was loading it back, and he threw the other shells over the fence. And then we walked to the house and when we got to the house, when we walked in, I mean, it was a lamp with fuel in it.

Q Did you discuss with Mr. Cruse on the way back up the road what had happened?

A Really, we were kind of quiet. I mean, we ran up to the house. We got to the house. It was a lamp full of lamp fuel. We decided to burn the house. Well, it was my idea to burn the house down, but he grabbed the lamp fuel and he ran down the hall. I don't know what he put it on back there or nothing. I didn't go back down the hall. I was in the living room. I just took a book of matches and I lit the sofa; I lit the sofa. And he was back in the back. I don't know what he lit in the back. I wasn't back there.

Q But he lit something?

A He lit something. I saw flames and all back [179] there, but, I mean, I didn't go back there to see what he lit.

Q Once the house caught fire, what did you do then?

A We ran out to the Jeep and drove to Fredericksburg.

Q Now, when you were in Fredericksburg – Had you ever been to Fredericksburg before? Did you know anything about Fredericksburg at all, the area?

A That was the first time I'd ever been in Fredericksburg in my life.

Q Why did you go to Fredericksburg?

A He said he had some friends he could sell the stuff to.

Q So why don't you tell the Jury what you did then? Once you got to Fredericksburg, what did you do?

A After we sold the stuff, what we had left, we ended up going – I mean, I didn't know how to get around Fredericksburg. He led me down to that river.

Q You were driving?

A I was driving. I drove down this like dirt road. it was all muddy and I got back in it, because it was four-wheel drive and I wanted to get it way off the road. We got it down off the road by the river. We both lit the truck. I mean, after we got the truck burning – [180] We had pulled all the merchandise that was left out of the truck and after it was burning we carried it to the river and threw it in the river. Then we walked on downstream to the bridge, or ran downstream. I had the .357 at this time. I took the .357 and flung it in the river. He got ready to throw the .38 in the river, but when he got ready to throw the .38 in the river, I said, "Hold it." I said, "Let me have that gun," and he said, "Okay," and he gave me the gun, because it was small and it would fit in my pocket. I put the gun in my pocket. We walked across over to Fredericksburg and went to a bar. We drank a couple of beers. I think it was just one or two apiece. Then we called a taxi, took a taxi to the Greyhound station and caught Greyhound to Richmond. I mean, then we got to Richmond. We didn't pay for the ticket. We ran out of the Greyhound station. We didn't run. We really just, we just walked out. But after we got out of the Greyhound station, I called my brother, Johnny. My brother, Johnny, come to pick me up.

Q Where did he pick you up?

A Well, really, he said he couldn't at the time. He said he had to wait until Mom got home. He was watching my little brother. So I called a taxi and caught a taxi from there over to the Clover Leaf Mall area, down by The Grocery Store. I think that's what the name of the [181] grocery store is, The Grocery Store, or something like that, in Chesterfield. We got up there at that parking lot and while in that parking lot, we waited for Johnny. I called again and Johnny showed up finally to pick us up with Kara Echenrode (phonetic), his girlfriend.

Q Did you still have the .38 in your possession or did Mr. Cruse have it?

A I did.

Q You did?

A Yes, I did.

Q Then what did you do?

A When Johnny showed up, I said, "Johnny, I have something to tell you." And Johnny got out and me, him and Jeff Cruse walked over in the parking lot together and I told Johnny what had happened; me, him, and Jeff Cruse. And after I told him what had happened, he said, "Don't tell me no more." He said, "I don't want to know any more." I lied to him the first time. The first statement I gave him, I lied to him, because I didn't want him to think – I mean, it was my brother and I didn't want him to think that I had been involved in anything like that. So I lied to him the first time I talked to him. I told him a statement that wasn't true. Then we got back to the Lozano's house and Jeff got out and that was the last time I had seen him. We went on back to our house. When

[182] we got to my mother's house, I took the .38 and I threw it in the woods. That's where the gun is now. I threw it in the woods behind the house.

Q At the point in the thicket, you're telling the Jury that you fired how many times?

A One time.

Q And with what weapon?

A The .38.

Q Have you ever been convicted of a felony?

A Yes, I have.

Q How many?

A Two felonies.

Q Have you ever been convicted of a misdemeanor involving lying, cheating or stealing?

A One.

MR. FORD: That's all I have.

CROSS EXAMINATION

BY MR. VON SCHUCH:

Q Mr. Williams, do you know what a Motion to Exclude Witnesses is?

A No, I do not.

Q Have you been watching the trial as we've been going along here?

A What, on T.V.?

[183] Q No, right here in the courtroom.

A Pretty much, I mean.

Q Where have all the witnesses been coming from?

A Outside.

Q So that when the witness came in, they didn't get a chance to hear who testified before them, did they?

A What do you mean?

Q In other words, they were outside?

A Right.

Q So they didn't get a chance to hear who testified before them, did they?

A They did not.

Q And then they would testify and they'd go back out, wouldn't they?

A Yes, sir.

Q So none of those witnesses have heard anything that was said in this courtroom other than what they told this Jury; is that right?

A Right.

Q But that's not true in your case, is it?

A What do you mean?

Q You're the only witness who has sat in here through this trial and heard the testimony of every witness [184] before you got to testify; isn't that correct?

MR. FORD: Judge, I think that's –

THE WITNESS: Well, I had to.

MR. FORD: Excuse me. I think that's improper. He has a constitutional right to be here at all stages of the trial, and it was my Motion to Exclude Witnesses. He's trying to use that fact to convince this Jury that he has been exercising his constitutional rights to stay here and confront all of his accusers and see everybody, and I think that that's improper, I think it's improper.

MR. VON SCHUCH: Judge, I think he's giving me more credit than I'm entitled to.

MR. FORD: I apologize if I have.

MR. VON SCHUCH: I think the Jury ought to have pointed out to them that this witness had occasion to hear all of the other testimony before he testifies. His credibility is in issue and where his story comes from, they have a right to determine and decide.

MR. FORD: But I don't think you can beat him over the head with his constitutional rights. That's certainly a right of his.

THE COURT: Well, he can't beat him over the [185] head, certainly, for being in here, but he can ask him if he heard all the other testimony.

BY MR. VON SCHUCH: (Continuing)

Q And your answer to that question would be yes?

A Yes, sir.

Q Now, I think you've indicated to Mr. Ford you are a convicted felon?

A Yes, sir.

Q Two times?

A I think that's what it is, what my record said. I might be wrong. This is what my record said; that's what I saw.

Q Let me ask you this. You indicated that when you were picked up in Richmond, your brother came and picked you up; is that correct?

A Yes, sir.

Q And your brother's name is Johnny Williams?

A Yes, sir.

Q You indicated that you took him aside, I believe, outside the presence of Mr. Cruse?

A Me, him and Cruse walked over there.

Q Was Mr. Cruse present when you told your brother the first story about what happened?

[186] A Yes, he was.

Q And he didn't say anything?

A He said nothing at all.

Q I believe the first statement that you told your brother was, "All right, first I was told that they had gone in there and that Jeff and Mr. Keller had gotten into a quarrel of some kind and that Jeff pulled out a gun and shot her and shot Mr. Keller and placed the gun on my brother and asked him if he was going to snitch and my brother said no and he said he'd cooperate and then he

helped carry the bodies out into the yard." Is that the first statement you told your brother?

A That's the exact statement I told my brother.

Q And you are telling this Jury that Mr. Cruse was standing there –

A Yes, he was.

Q – while you are putting all this on him and he says nothing?

A Well, Jeff just didn't say anything. He was standing –

Q He didn't say anything, that's my point. He didn't say anything?

A I don't know why. He just stood there. He didn't say anything.

[187] Q It turns out your brother is a little bit smarter though, isn't he? He figured out that that wasn't true and you had to tell him another story, didn't you?

A Well, I told Mr. Ford that I lied to him, because my brother – It's my brother. I didn't want my brother to think I'd been involved in anything like that. I mean, that's what I told Mr. Ford. I did lie to him. On the first statement I lied to him. I didn't want my brother to know I'd been involved in anything like that.

Q Well, let me ask you about this. The second story you told him, did it go something like this? This is when you and Mr. Cruse are in the woods. "At that time they decided they would count to three and pull the triggers so one could not finger something on the other. And they

counted to three and my brother pulled the trigger and shot Mr. Keller in the head. And then Jeff did not pull his trigger at this time and Mike turned around and looked at him and said, 'What are you doing', and he pulled the trigger and fired and he reached over and grabbed the gun out of my brother's hand and shot Mrs. Keller two more times in the head and then reached over and shot Mr. Keller two more times in the head and then they went back to the house and set it on fire."

A I think my brother must have been mixed up on that. I don't remember telling my brother that.

[188] Q You deny making that statement to your brother?

A Yeah. I deny making that statement right there.

Q The .357 that you had in your possession, where did you get that, Mr. Williams?

A Where did I get it?

Q Uh, huh (yes).

A I found it.

Q You found that gun?

A Yes, I did.

Q Where do you find guns like that?

A Where did I find guns like that?

Q Yeah.

A In Prince Edward.

Q Whereabouts in Prince Edward did you find it?

A At a house.

Q Did it belong to somebody else?

A Yes, it did.

Q And did they want you to take that gun?

A I don't think they did. No, they didn't want me to take the gun.

Q So you found the gun at someone's house and took it and they didn't want you to take it and that's [189] where you got the gun?

A They did not want me to take it.

Q And that's where you got the gun?

A Right.

Q And you call being in someone's house and taking their property "finding"?

A What's that now?

Q Do you call being in someone's house and taking their property as a finding?

A (No response.)

Q Is that what you were going to do when you went to the Kellers, find some money and find some jewelry and find a refrigerator; is that what you were going to do?

A I went to the Keller house to steal their money.

Q Now, you have gotten on the witness stand here today and you have sworn to tell the truth; is that correct?

A Yes, sir.

Q You have put your hand on the Bible and you have sworn to tell the truth, as I observed you; is that correct?

A I've sworn to tell the truth. I didn't lay my hand on a Bible.

Q And what you've told this Jury is that Jeff [190] Cruse raped Mrs. Keller; is that correct?

A Yes, sir.

Q And, in fact –

A Well, I didn't see him do it. That's what he told me. I mean, I wasn't back in the room.

Q But you told him not to?

A I told him it wasn't a very good idea.

Q You thought it was a bad idea?

A I told him that DNA would pick it up and it would be a bad idea.

Q And you are telling this Jury that you did not go back in there, and I want to be very clear about this? You are telling this Jury, under oath, having agreed to tell the truth under oath, that you did not go back there and rape Mrs. Keller. Is that what you want this Jury to understand?

A Yes, it is. Yes, sir.

Q How many bullets were there in the .357?

A There were two bullets in the .357.

Q There were two bullets in the .357?

A Yes, sir.

Q When you went out into the woods with the .357, Mr. Cruse had the gun; is that correct?

A Yes, sir.

Q And as you were standing in front of [191] Mr. Keller and he was standing in front of Mr. Keller, he had two bullets in the .357, didn't he?

A Yes, sir.

Q And you had a loaded .38?

A Yes, sir.

Q As I understand your testimony, you both fired at the same time and Mr. and Mrs. Keller –

A I didn't say the same. I said it was like a bamm and then bamm thing, I mean.

Q Pretty much simultaneously?

A Well, really, it was like bamm and while I was turning to look, his gun went off. I mean, it –

Q He shot last?

A Yes, he did.

Q And Mr. and Mrs. Keller went down?

A Mr. Keller fell and then Mrs. Keller fell.

Q Did you all start to leave the woods at that point?

A No. We stood there and looked at him and I said, "Let me get my gun back," and he said, "Okay," and we

were switching. But while we were switching, I had the .357 and this in my hand, but he was pulling it out of my hand, and while he was pulling it out of my hand and it was halfway out, we heard a ruckus in the leaves and all, and I turned around and Mr. Keller was halfway up, staring at us, [192] standing up. And Cruse had his hand on it. He pulled it out of my hand like that. I jumped back and Cruse walked forward. I watched Cruse's hand raise up in the air, but, I mean, I was going back toward the road. I turned around. I heard gunshots go off, but I don't know what happened.

Q Now, is that as true as the statement that you did not rape Mrs. Keller?

A Yes, it is.

Q At the time he jumped up, you both had possession of both guns, is that right?

A What's that now?

Q At the time that Mr. Keller got back up, you both had possession of both guns, in effect?

A No. I said I had the .357 and he was pulling the other one out of my hand at the time.

Q You still had one bullet left in the .357; is that correct?

A Yes, I did.

Q And it's your testimony, Mr. Keller jumping up in front of you, you were not the one that fired that second shot?

A I only had one bullet in the gun and it was still in there when they found the gun.

Q Well, I know. You've heard the testimony of that today, didn't you?

[193] A No, I mean, I was there.

Q Where did you go when you found out they were looking for you?

A Where did I go?

Q Uh-huh (yes).

A I went to Florida.

Q Well, you were caught in Georgia?

A Yes.

Q With Mr. Keller's jacket?

A Yes, I was.

Q You wore his jacket after you had done that to his wife and robbed him and shot –

A The only reason I took the jacket is because, I mean, they wasn't dead yet when I took the jacket. We won't planning on killing them. We were going to leave them in the woods when we went there. We only had two bullets in the gun when we went there.

Q Are you confused about what you did to the Kellers?

A No, I'm not. I said –

Q And you kept his jacket, that's my question, and you wore his jacket?

A The only reason I kept the jacket when we left there was because it was snow on the ground. It was cold and I only had a little thin jean jacket. It was [194] cold.

Q You've indicated, as a convicted felon who has heard all the testimony of all the witnesses in here and who has lied to his brother about this, that this is the absolute truth; is that correct?

A It is the truth.

Q Let me ask you something then, Mr. Williams. Isn't it a fact that if Jeff Cruse had never said a thing, you wouldn't be here on trial?

A That is a fact.

MR. VON SCHUCH: That's all the questions I have.

MR. FORD: No redirect, Judge.

THE COURT: You may step down.

MR. FORD: The defense rests.

THE COURT: Any rebuttal?

MR. WOODSON: No, sir, Your Honor. No, sir.

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

COMMONWEALTH OF VIRGINIA

v.

MICHAEL WAYNE WILLIAMS

THE HONORABLE JOHN R. SNODDY, JR., PRESIDING

Trial – Day Four
Cumberland, Virginia
January 6, 1994

* * *

[9] THE COURT: Let the record show that all of the Jury is present and in the box; the defendant and his attorneys are present; and the Commonwealth's Attorneys are present.

Now ladies and gentlemen, as I told you before, you have heard all of the evidence and now the Court will instruct you as to the law that you will apply to the evidence that you have heard.

The Court instructions the Jury that the defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require

proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is [10] not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

You are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony [11] accordingly.

You may consider proof of the defendant's or a witness' prior conviction of a felony or crime involving

moral turpitude as affecting his credibility, but it does not render him incompetent to testify, nor shall you consider it as evidence of the defendant's guilt of the offense for which he is on trial, nor shall you consider it in fixing punishment if you do find the defendant guilty.

The fact that the defendant has been indicted – I think we've already stated that in here, gentlemen, in the first instruction. Will you all look back at that? The first thing, "You should not assume the defendant is guilty because he has been indicted and is on trial." So I don't think we ought to –

MR. VON SCHUCH: Judge, it is the law, and to the extent that it's redundant, it's not necessary, if it's already in an instruction, so I don't have any objection if the Court removes that.

THE COURT: The defendant is charged with the crime of statutory burglary while armed. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant without permission in the nighttime entered without breaking a dwelling house; and

[12] (2) That he did so with the intent to commit robbery; and

(3) That at the time of the entry the defendant or Jeffrey Alan Cruse was armed with a deadly weapon.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offenses as charged, then you shall find the defendant guilty and fix his punishment at:

(1) A term of imprisonment for life or for any term not less than twenty (20) years; or

(2) A term of imprisonment for life or for any term not less than twenty (20) years and a fine of not more than $100,000.00.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above elements of the offense, then you shall find the defendant not guilty.

A deadly weapon is any object, not part of the human body, which can cause, or gives the appearance of being capable of causing, death or great bodily harm.

The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intended to steal; and

[13] (2) That money, guns, VCR, television, microwave, various jewelry, Cherokee Jeep and other tangible personal property was taken; and

(3) That the taking was from Morris C. Keller, Jr. or in his presence; and

(4) That the taking was against the will or the owner or possessor; and

(5) That the taking was accomplished by violence to the person or by the threat or presenting of firearms.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall

find the defendant guilty and fix his punishment at confinement in the penitentiary for life or for any term not less than five (5) years.

If you find that the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intended to steal; and

(2) That money, guns, VCR, television, microwave, [14] various jewelry, Cherokee Jeep and other tangible personal property was taken; and

(3) That the taking was from Mary Elizabeth Keller or in her presence; and

(4) That the taking was against the will of the owner or possessor; and

(5) That the taking was accomplished by violence to the person or by the threat or presenting of firearms.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at confinement in the penitentiary for life or for any term not less than five (5) years.

If you find that the Commonwealth has failed to prove any one or more of the elements of the offense

beyond a reasonable doubt, then you shall find the defendant not guilty.

The defendant is charged with the crime of rape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant had sexual intercourse with Mary Elizabeth Keller or that the defendant was a principal in the second degree to the [15] rape of Mary Elizabeth Keller; and

(2) That it was against her will; and

(3) That it was by force, threat or intimidation.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at confinement in the penitentiary for life or for any term not less than five (5) years.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

A principal in the first degree is the person who actually commits the rape. A principal in the second degree is a person who is present, aiding and abbeting, by helping in some way in the commission of the rape. Presence or consent alone is not sufficient to constitution aiding and abbeting. It must be shown that the defendant intended his words, gestures, signals or actions to in

some way encourage, advise, or urge, or in some way help the person committing the rape to commit it.

A principal in the second degree is liable for the same punishment as the person who actually committed the rape. The Commonwealth must prove beyond a reasonable [16] doubt that the defendant is a principal in the second degree.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

The defendant is charged with the crime of abduction. Kidnapping and abduction are the same crime. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant by force or intimidation did seize and detain Mary Elizabeth Keller; and,

(2) That the defendant did so with the intent of depriving Mary Elizabeth Keller of her personal liberty; and

(3) That the defendant acted without legal justification or excuse.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at:

(1) A term of imprisonment of not less than one (1) nor more than ten (10) years; or

(2) Confinement in jail for not more than [17] twelve (12) months; or

(3) A fine of not more than $2,500.00; or

(4) Confinement in jail for not more than twelve (12) months and a fine of not more than $2,500.00.

If you find the Commonwealth has failed to prove any one or more of the elements beyond a reasonable doubt, then you shall find the defendant not guilty.

The defendant is charged with the crime of abduction. Kidnapping and abduction are the same crime. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant by force or intimidation did seize and detain Morris C. Keller, Jr.; and

(2) That the defendant did so with the intent of depriving Morris C. Keller, Jr. of his personal liberty; and

(3) That the defendant acted without legal justification or excuse.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at:

(1) A term of imprisonment of not less than [18] one (1) nor more than ten (10) years; or

(2) confinement in jail for not more than twelve (12) months; or

(3) A fine of not more than $2,500.00; or

(4) Confinement in jail for not more than twelve (12) months and a fine of not more than $2,500.00.

If you find the Commonwealth has failed to prove any one or more of the elements beyond a reasonable doubt, then you shall find the defendant not guilty.

The defendant is charged with the crime of arson. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant burned a dwelling house; and

(2) The defendant acted maliciously; and

(3) That the defendant acted in the nighttime.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at:

(1) A term of imprisonment for life or for any term not less than twenty (20) years; or

(2) A term of imprisonment for life or for any term not less than twenty (20) years and a [19] fine of not more than $100,000.00.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above elements of the offense, then you shall find the defendant not guilty.

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant and Jeffrey Alan Cruse killed Mary Elizabeth Keller; and

(2) That the killing was willful, deliberate and premeditated; and

(3) That the killing of Mary Elizabeth Keller occurred during the commission of robbery while the defendant was armed with a deadly weapon;

AND/OR

(4) That the killing of Mary Elizabeth Keller occurred during the commission of, or subsequent to, the rape of Mary Elizabeth Keller.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you [20] shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that Jeffrey Alan Cruse was the person who killed Mary Elizabeth Keller then you shall find the defendant guilty of first degree murder and fix his punishment at:

(1) Imprisonment for life; or

(2) A term of imprisonment of not less than twenty (20) years.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed Morris C. Keller, Jr.; and

(2) That the killing was willful, deliberate and premeditated; and

(3) That the killing of Morris C. Keller, Jr. occurred during the commission of robbery while the defendant was armed with a deadly [21] weapon:

AND/OR

(4) That the killing of Morris C. Keller, Jr. occurred during the commission of, or subsequent to, the rape of Mary Elizabeth Keller;

AND/OR

(5) That the killing of Morris C. Keller, Jr. occurred as part of the same act or transaction in which the defendant also killed Mary Elizabeth Keller.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that Jeffrey Alan Cruse alone killed Morris C. Keller, Jr. then you shall find the

defendant guilty of first degree murder and fix his punishment at:

(1) Imprisonment for life; or

(2) A term of imprisonment of not less than twenty (20) years.

If you find the Commonwealth has failed to prove [22] any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

Willful, deliberate, and premeditated means the adoption of a specific intent to kill. The intent to kill must come into existence at some time before the killing, but need not exist for any particular length of time.

You have been instructed on more than one grade of homicide and if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant, and find him guilty of the lesser offense.

You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal shooting, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death.

All right, those are the instructions that you all will apply to the evidence that you have heard. Now these ladies and gentlemen will have an opportunity to argue their case before you.

MR. WOODSON: May it please the Court, Your Honor. Ladies and gentlemen of the Jury, I want to again

[23] thank you for serving as jurors in this case, taking your time off from your jobs and other things to come and serve. As I spoke to you in the beginning, we would be presenting evidence to you and would ask you to listen to the evidence and strictly make your decision from the evidence that you heard from the witness stand, that what the Commonwealth said to you was not evidence and what the defense said to you was not evidence.

At this point, the evidence is in; you've heard from all of the witnesses, and now it's your decision to determine the facts and make a decision based on the instructions that the Court has given to you.

The things about this case that are uncontradicted, I'll go through with you. There's no question about Morris Keller and Mary Elizabeth Keller being home on a Saturday night in Cumberland County; had not been out, were there at home, over in the Trent's Mill area. There's no question that Mr. Williams and Mr. Cruse went to the Lozano house, next to the Cumberland County Public Library. There's no question about that.

There's no question about Mr. Williams offering Albert Lozano one thousand dollars to take he and Mr. Cruse to a place to rob it. There's no question about that. But Mr. Lozano wouldn't do it; he knew something was not right about it and had been drinking too much. There's [24] no question about Verena James taking Mr. Williams and Mr. Cruse to Mr. Williams' house down 45. There's no question about that.

There's no question about Mr. Cruse then having a .357 pistol, which he showed to Ms. James and said that it belonged to Mr. Williams. There's no question about that.

There's no question about Ms. James then driving them to Bear Creek Market. Mr. Williams and Mr. Cruse, letting them out just below Bear Creek Market and Mr. Williams and Mr. Cruse then going to Bear Creek Market to rob it, but it being closed or ready to close and it just wasn't suitable to rob it. There's no question about that.

There's no question then Mr. Williams telling Mr. Cruse – and you've got to remember, Mr. Williams is from this area, he's told you that. He lived in that area, not far from where Mr. and Mrs. Keller lived at. He picked the house. He knew where there was an easy place to rob, back off the road. They walked to it, a mile and a half, and went to that house.

Mr. Cruse didn't know where Mr. and Mrs. Keller lived at. Who would Mr. and Mrs. Keller know? He picked some people to rob that he knew. Did he disguise himself? He went to that house; at the point when got to the house, he told you Mr. Cruse gave him the .357. They [25] knocked on the door. The plan was to ask Mr. Keller could they use the telephone. They asked Mr. Keller could they use the telephone, but he said, "Give me the number." At that point, Mr. Cruse opened the door, they walked into the house. There's no question of what happened in that house.

Mr. and Mrs. Keller were robbed. Mrs. Keller was raped – There's some question about if it was Mr. Williams who raped her and we'll talk about that. There's some question about that, but Mr. Cruse has told you what happened. You know about the abduction; you know about what happened when they left the house.

You know that Mrs. Keller asked for her marriage certificate; you know that they were both led down a road; you know that they were both found in the woods shot. You've seen pictures of that. You know Mrs. Keller was laying there with her marriage certificate clutched in her arms and you know that they then went back to the house and then burned the house.

They then took the Jeep. You've got witnesses from Fredericksburg that told you they bought property from Mr. Williams and Mr. Cruse and they identified both of them. They bought property the next day from them. You've got the evidence coming in, being given to you by members of the family, that it was Mrs. Keller's and Mr. Keller's items that were sold in Fredericksburg. No question about any of that. Now let's go back and look [26] at Mr. Cruse.

The Commonwealth put him on as a witness and let's look at what the evidence showed about Mr. Cruse, what situation he's in today. When he was first confronted about this case in the investigation, he told you, he did not tell the truth about it, he denied it. There was no evidence to charge Mr. Cruse. We could not charge Mr. Cruse with anything that happened at the Keller house, nothing that happened to the Keller family, nothing that happened in Fredericksburg. We didn't have any evidence. He denied it.

But we did have some evidence on him that he had a concealed weapon, the one he had shown to Ms. James. He was arrested on that, on a misdemeanor charge, and put in jail. We still had no evidence. We had no evidence of what he had done at the Keller house or what Mr.

Williams had done at the Keller house. But he had an attorney appointed to represent him on the misdemeanor charge and he talked, he told, he came forward. We couldn't charge him, but he told. He said what he did; he said he shot Mrs. Keller.

At that point, from what we were told by Mr. Cruse, we made an agreement with him, and we agreed that if he would tell us everything, give us the whole story that we want to know, we will not seek the death [27] penalty, "But you've got to tell us everything." He said he did, but evidence came up that Mrs. Keller had been raped. He didn't tell us that. Evidence also came up that some property had been sold in Fredericksburg and he had told us it was sold in Richmond. He didn't tell us that.

All right, at that point in time, Mr. Cruse's first attorney was out of the case and he had two new attorneys, two brand new attorneys that were suitable to him, and we met with them and we met with Mr. Cruse. And again, we didn't have evidence, other than Mr. Cruse; we had no evidence to charge him with, other than what he was telling us. We had no evidence; we told him that. "You didn't tell us the truth. You didn't tell us about the rape. You didn't tell us about selling the property up in Fredericksburg. The agreement is gone; it's torn up; there is no more agreement."

He said he understood that. Then we told him, "If you want to talk, that's up to you. If you talk, you face capital murder. It's up to you." He told us; he told the whole story. At that point he told everything that happened, he told about the rape, and then, ladies and gentlemen, he is faced with two counts of capital murder. He

faces the death penalty. There is no agreement with Mr. Cruse. What he is doing is on his own. When this is over he goes to trial and he faces the death penalty on two [28] charges of capital murder.

Now let me tell you what we have tried to do with you to corroborate him, to try to show you how you can believe him, why he's telling the truth. You have heard from Albert Lozano; you have heard from Verena James; you have heard from Lisa Schiermeier, the witness who came and told you about the rape; you've heard from George Li who came and told you about the rape; you've heard from Mr. Hallett who told you about the boot prints up in Fredericksburg; you've heard from Mr. and Mrs. Sine who identified Mr. Williams and Mr. Cruse in Fredericksburg; of Ms. Tolley and Mr. Ramey.

You've heard about all of that. You've heard from the officers in Fredericksburg as to them being up there and all of that being corroborated and trying to show you that what Mr. Cruse is telling is correct. If I can compare the two people, Mr. Williams and Mr. Cruse, and try to go through a little bit of their testimony with you to show you some differences.

Look at Mr. Williams' record. He told you on the stand that he had two felony convictions and one conviction of a misdemeanor or crime of moral turpitude. You can consider that in how believable he is. Let's look at Mr. Cruse. He has no felony convictions; not the first one. He's got one misdemeanor conviction of a crime of [29] moral turpitude; lying, cheating or stealing. Mr. Williams has got two felony convictions.

Let's look again. Who owned the .357? Who did that .357 belong to? Mr. Williams told you; it's his .357. But yet he lied about it. Albert Lozano testified to you that Mr. Williams told him he bought the gun. Well, what did he tell you? He found it. And then on cross examination he was asked, "Where did you find it?" You normally think you'd find something lost somewhere. He found it in somebody's house. "Well, did they want you to take it?" "No." Is that what you call finding?

Okay, it's his gun, it's his .357. Let's go further. Who suggested robbing the Bear Creek Market? Who knew about the Bear Creek Market? Mr. Cruse didn't know about Bear Creek Market; Mr. Williams did. When they couldn't rob Bear Creek Market, who knew about Mr. And Mrs. Keller? Mr. Cruse didn't. He didn't even know Mr. And Mrs. Keller, he'd never seen them before, he didn't know where they lived at. And who knew somebody that lived back off the road, that you might rob, and you're going to leave them as witnesses, you don't disguise yourself? You're going to go rob them and you're just going to walk away? What's going to happen to you? Do you think he did that?

Let's go into the hours. Again, Mr. Williams has told you at the time that they entered the [30] house, he had the .357. He has told you inside the house as to what happened and he's admitted to the robbery. Mr. Williams has done that and Mr. Cruise has done that. All that's been told you, how they looked through the house, how he kept the gun on Mr. And Mrs. Keller. But he denies the rape.

And let's remember now, he lied to his brother. He told his brother that he didn't shoot anybody. He never did anything, it was all Williams [sic], Williams did everything. Then he told you he finally told his brother another story, he shot one time, but he didn't rape her. He still says he didn't rape. But let me tell you something that doesn't lie to you, is Lisa Schiermeier and George Li.

George Li came in and told you, based on DNA testing, that they both could've raped her. You remember the chart George Li laid up there, the dots that Mr. Cruse had and they matched Mr. Cruse. If he was the only rapist, it was Mr. Cruse. He was then saying, "Okay, under the theory that there were two rapists, let's look at Mr. Williams." And if you look at Mr. Williams' dots, his dots fell exactly under Mr. Cruse, except one place, so that meant Mr. Cruse's dots would cover up all of Mr. Williams', so in the DNA testing, it would show exactly what it did if both of them raped. And that's what [31] Mr. Li told you, based on the evidence from Mr. Cruse that both raped, that's what his test showed.

But, now, let's look over to Lisa Schiermeier. That's the real key. She is the one that showed you the test that whoever raped Mrs. Keller had a 2-. One of the factors was a 2-. And out of the three men – Mr. Keller, Mr. Williams, and Mr. Cruse – who had a 2-? Mr. Williams. He's the only one that had a 2-. Yet he gets on that stand and tells you he didn't rape? Is that believable? That test does not lie, but he wants to tell you that. He wants you to believe that. Mr. Cruse has corroborated it, Lisa Schiermeier corroborated it, George Li corroborated it.

Now let's go further. Then Mr. Williams says that when he left the house, he told them he was going to take them down to the creek and hide them, because he hunted in that area. Then he told them he was going to burn the house. Do you go to a house and rob it, people that you know, you rob it and you're going to leave and they're going to be able to identify you? Remember, they didn't know Mr. Cruse. Do you go to the house and you rob them and you rape them and you're going to take them down to the creek and you're going to hide them and leave them there? They're going to come out of the woods and identify you. Do you leave them down there? Do you go to the [32] house, and you break and enter it, you rob them, you kidnap them, you rape them, you take them down to the creek and leave them there and come back and burn the house? They're coming back from the creek and they're going to identify Mr. Williams. Is it believable, when he left that house with them, that he was going to leave them alive in the woods? Is that believable?

Is it believable that she went to get her marriage certificate just because she thought it was going to be burned up in that house? I submit that Mrs. Williams knew what was going to happen when they went down that wood road that night.

And then he wants you to believe, he gets on that stand and asks you to believe that he went out in the woods – And let me go back again. Remember, he wanted the loaded .38 in the house. The question is, why did he get the .38 in the house? He was going to stand as lookout in the front and he wanted the loaded .38 because he would've had six shots rather than two shots. He told

you it was only two shots in that .357. He wanted the fully loaded .38. And when he went down that wood road that night, when he walked Mr. and Mrs. Keller and she was begging him not to hurt her in that house, and begged them not to hurt her husband, they walked them down that wood road that night, that winter night in the snow, two or three hundred yards, [33] over in the wooded are where Mr. Williams told you he hunted. He hunted in that area around the creek where he was going to carry them to. Did he carry them to a creek? Did he lose them at a creek? He walked them over there and he told you that he shot Mr. Keller first. Who shot first? He shot Mr. Keller first. That's what Cruse told you.

Who did not want to leave witnesses? Who, in your mind, would not want to leave witnesses? Cruse didn't even know Mr. and Mrs. Keller. They would not recognize Cruse. Who would they recognize? Mr. Williams. But he wants you to believe that he shot Mr. Keller, then all at once he turned and Mr. Cruse shot Mrs. Williams, and then Mr. Keller gets up and then he's telling you that Mr. Cruse comes and jerks the .38 out of his hand, pulls it out of his hand. Who would want to kill Mr. Keller at that time? Mr. Williams. He doesn't want any witnesses. Why would he want to leave Mr. Keller alive? Why would Cruse run over there and grab the .38? That just doesn't – It's unbelievable.

I submit to you that Ann Jones and Dr. Kay have corroborated everything that Mr. Cruse has testified to. They have told you that Mrs. Keller has shot with three different gunshot wounds to the head. Mr. Keller was shot with gunshots to the head and to the legs. The bullets they recovered -- They recovered a bullet at the

[34] scene; they recovered a bullet in the body bag of Mrs. Keller; they recovered a bullet in Mrs. Keller's head; they recovered a jacket off of a bullet in her back. They've testified to you that the bullet found at the scene was a .38; the bullet found in the body bag of Mrs. Keller was a .38; the bullet found in her head was what appeared to be a .38, that it had characteristics that it was all made by the same manufacturer. And she's told you that there was one .357; one, and that was it. And that's what Cruse told you. He told you there was one .357 fired. She's told you that; the other three bullets were different.

The ones found on the ground, she's told you could not have been fired by the .357. The one found in the body bag could not have been fired by the .357. And then what does Mr. Cruse tell you? He tells you he comes back out to the road, Mr. Williams hands him the .38 and tells him to reload it, because Mr. Williams doesn't have the .38 bullets. Mr. Cruse had stuck them in his pocket at the hours when he found the .38. That was before he gave the .38 to Mr. Williams because Mr. Williams wanted that fully loaded gun.

He told you he emptied the gun, took the cartridges and threw them over in the woods. The State Police went there. They found exactly what he told them. [35] He told them where they were at. They found those and you heard Ann Jones tell you, those four spent cartridges could not have been fired by the .357, could not have been, they had to be fired by a different gun.

Then what happened? They came back. And again, Mr. Williams does not want to leave any evidence. He's the man that's known to Mr. and Mrs. Keller. What does

he do? He loads stuff out of the house into the Jeep and burns the house down. Mr. Cruse is in it, they're both in it, but Mr. Williams is the one that knows Mr. Keller; he's the one that cannot leave witnesses and leave evidence. Then they drive the Jeep up to Fredericksburg and sell the property in Fredericksburg.

And you've heard witnesses say who was driving the Jeep. Mr. Williams is driving the Jeep. Then you've heard testimony as to where Mr. Williams was arrested. He was arrested in Georgia; he was picked up in Georgia. Officer Holt got on the stand and told you, when he picked Mr. Williams up in Georgia, what kind of jacket was he wearing? He was wearing a leather jacket. What did Mr. Cruse tell you? Mr. Cruse told you that Mr. Williams took a leather jacket from Mr. Keller's house; took his jacket off and put a leather jacket on.

And what did Jimmy Keller tell you? He told you that was his brother's jacket. And what did [36] Mr. Williams tell you? He told you that's right; he is wearing Mr. Keller's jacket. In Georgia, after murdering Mr. and Mrs. Keller, he's wearing the mans' jacket around.

Did he show you any emotion? Did you see emotion from him? What did you see from Mr. Cruse? Did you see some emotion from him? Didn't you see him cry some? But what emotion did Mr. Williams show you from that stand?

And then coming back with Mr. Holt, Mr. Holt told you – and these are believable people – he says, "What did Jeff Cruse tell you?" Mr. Williams said, "What did Jeffrey Cruse tell you about this?" Mr. Holt says, "He told us what happened. He told us the whole story."

There's one more little thing that comes up. Mr. Holt said, "We also found the .357. We've got the .357 out of the river." And you know who told him where to find the .357. Who helped do that? Mr. Cruse. Mr. Cruse, he told them the .357 was in the river in Fredericksburg. Where did they find it? Right where he said. He took them over there and showed it to them. It's corroborated, he's believable.

But what does Mr. Williams say when Officer Holt tells him that Mr. Cruse has told the whole story and they've got the .357? What does he say? And excuse my language, but Mr. Williams says, "I can prove that [37] Mr. Cruse had that goddamn .357." Now why does he do that? Because he knows that that .357 can be matched up with a bullet from Mrs. Keller. He knows that and he's going to put that .357 – And that's the only time he's told you the truth. He's going to put it in Mr. Cruse's hand because he knows where the .38 is. We don't have the .38 today. That .38 is not here. He knows it, he knows the .38 is not here and that we have no way of getting ballistics on it.

But let me tell you something. He sat right here – and he's got a right to do it – and he listened to everybody. Mr. Cruse didn't have that right to sit here and listen to everybody. He came in and told you as it was and it was corroborated right down the line on everything he said. You heard the witnesses, honest witnesses, believable witnesses, that showed you that Mr. Cruse is believable. He's telling it like it is. And Mr. Williams had his right to sit in here and listen to everything that happened.

And guess what? After he listens to everything, after he's told Mr. Holt that, "I can put that goddamn .357 in Mr. Cruse's hand," what does he do? He gets on there and tells you, "Huh-uh, wait a minute. I'm going to change my story some now. He grabbed the .38 from me." He knows he's got to get that .38 out of his hand. He can't say he had that .38. Now he's telling you that [38] somebody ran up and grabbed it out of his hand. But remember who can't have the witnesses; remember who picked the house to rob, that knew the people and didn't disguise themselves; remember the man who said he didn't rape and Lisa Schiermeier told you there's no question that he raped. He's the only one in there with a 2-. There's no question about that; that test doesn't lie.

Remember the man who told Mr. and Mrs. Keller he was going to walk them to the creek, because he knew the area where they hunted, and he was going to lose them at the creek and then burn the house up. You're going to rob from them, you're going to rape them, you're going to kidnap them, you're going to burn their house up, and you're going to leave them at the creek? Do you really think they believed that? Why did Mrs. Keller ask for her marriage certificate and where did they find it? Clutched in her arms, that marriage certificate.

Ladies and gentlemen, these are serious crimes. You've heard the Judge's instruction on what the punishment is. I would ask you to return a verdict of guilty on every charge in this case. And if you scale this case on one to ten, I will tell you this is a maximum case, it's a serious case. It's capital murder. There's no question. Mr. Williams is charged with five counts of capital murder

and I submit to you the evidence is beyond a [39] reasonable doubt that he's guilty of every one of them. I would ask you to return verdicts of guilty in each one of them. And again, I do appreciate the attention that you've given, I appreciate the duty you've done in serving. You've been a most attentive jury, you've listened to every bit of evidence, and I ask you to remember the evidence from the witness stand, remember who is believable, listen to the stories, use your common sense, and then deliberate. Thank you.

MR. FORD: If it please the Court, and ladies and gentlemen of the Jury, I, too, want to thank you for your attentiveness. I know it's been a long time and we're almost where were going to hand it over to you and let you make a decision in these cases, and there are a lot of cases that we are dealing with today and I think that's one of the important things.

When we talked before, when we were talking in voir dire and in the opening statement, I said it was going to be graphic. Capital murder is not a pretty murder, or any kind is not pretty. Rape, robbery, any of those types of crimes, there's going to be graphic evidence, but I think that you need to – and I think you will do this – I think you need to confine yourself. It tends to become emotional and I don't want you to view this as an emotional situation. You are the Jury and you are [40] charged with following the instructions the Judge has given you and apply that to the evidence that you hear in an unemotional, as best you can, I guess, an unemotional setting and an impartial way. And that's what we have charged you with and you indicated on voir dire that you would

do so and we have taken you at your word and that's why we have you on the Jury at this point.

The first thing I want to touch on, in any kind of a criminal case, is the burdens. And I think that's important. Everybody knows that in the United States if you are charged with a crime, you are presumed to be innocent, and that's a very important part. That distinguishes us from almost any other country in the world.

Michael Williams stands before you right now presumed to be innocent and it's up to the Commonwealth to prove beyond a reasonable doubt each and every element of each and every crime; and we've got a lot of crimes and a lot of elements. And it's going to take you a while to look over each one of them, compare it with what the Commonwealth has shown you, and make sure that you apply this standard that we use in each and every criminal case; beyond a reasonable doubt.

Suspicion is not enough – and the Judge has instructed you on that. You can suspect that he might be [41] guilty, but if you have a reasonable doubt on any element of any particular crime, then you have to find him not guilty of that particular crime.

Now as the Commonwealth has said, and it's pretty obvious from the evidence that you've heard, that we aren't disputing a lot of things that happened. There are a lot of things that Mr. Williams did on this particular evening that we can't condone and we don't intend to tell you to condone, but there are certain factors that we have to look at where there is a dispute.

Mr. Woodson has said that there was a lot of corroborating evidence. Well, it corroborates Mr. Cruse as well as Mr. Williams, because the stories are basically identical, with the exception of two points. And those two points are on the rape and on the actual shooting in the thicket.

Now let's talk about the rape first. The only person that actually puts Mr. Williams as the rapist is Mr. Cruse. He is the one that says that he was in the room, he saw the penetration, and all of that. What you have from the Commonwealth are two other scientists; one, Lisa Schiermeier, who came and tested the fluid that she had. And she said that he was a possible donor, could not be eliminated as a possible donor. So she didn't say he did it, she said he's a possible donor. Then you go to [42] George Li, who's the DNA expert. And everybody's heard about DNA and how important that is and how graphic that is and how well you can hone in on the defendant with that. But if you recall George Li, his slide showed that his test matched up Mr. Cruse perfect, absolutely to a tee. And the only reason he included Mr. Williams is because of one extra dot in there that he happened to share with Mr. Cruse, and so he said, "Well, we can't exclude Mr. Williams because of that."

Mr. Cruse's aligned up perfectly with that. And what Mr. Williams told you from the stand is that he didn't want to rape Mrs. Keller, that Mr. Cruse did, and we think that that's consistent with what Mr. Li has told you from the stand.

Now the biggest part of this case is the murders; what happened in the thicket. We can't dispute that Mr. Williams lived in Cumberland and that Mr. Cruse was not

from Cumberland, not from around here, had just gotten here a week or a month beforehand. And we can't dispute that Mr. Williams didn't live but a mile or two away from the Kellers. So, yes, he probably knew of them; not necessarily that he knew them exactly or they knew him exactly, but the families apparently had seen each other on the road possibly.

But that doesn't necessarily mean that he [43] has this great motive to kill. Mr. Cruse said that he had his hood over his face for a while and then he ended up uncovering it, so Mr. Cruse is just as open as Mr. Williams is. So when they go into the house, who's the first one in? Who barges into the door? Mr. Cruse.

While Mr. Williams was holding the Kellers at bay with a weapon, who's running around the house looking for stuff? Mr. Cruse. I mean, Mr. Cruse is here trying to portray himself as far removed from this. He's always saying, "Mr. Williams made me do this. Mr. Williams made me do that," but yet he's running around the house, he has several instances, once he gets the .38, where he could take control of the situation. He can leave. You heard Mr. Williams say he actually got the keys, went outside, started up the Jeep and backed it up. He could have left at that point in time, but he didn't. He stayed right in there with him.

And we also have to look at Mr. Cruse, because basically he's the crux. And we're talking about Mr. Cruse from the witness stand and Mr. Williams from the witness stand. Let's look at Mr. Cruse. He's lied on various different occasions to the police. He starts off with a statement that says, "I was at Bear Creek Market and then

we hopped a ride with somebody and went to Richmond and went barhopping." That's his first statement to the [44] police. Well, that may or may not be a normal situation. I mean, obviously he's worried and he doesn't want to implicate himself.

Then we get to the second statement. There's the offer; "We've going to give you first degree murder. Just tell us the truth. Here's your opportunity, your golden opportunity, to tell us the truth." And what does he say? He talks about the murder, he lays it all on Mr. Williams, and then he says nothing about the rape and nothing about selling the property in Fredericksburg. And what he says about not mentioning the rape, "Well, they didn't ask me about it."

I guess this is a situational kind of storyteller. As the situation progresses, he opens his story up a little bit more. He also lied to his friends in Fredericksburg. He told them that it was his property that they were selling. And he also lied in a preliminary hearing, under oath. He's under oath here to tell the truth, so you would hope that he would be telling you the truth, but he's got a track record.

In the preliminary hearing, he lied under oath about whether he had been convicted of a misdemeanor involving lying, cheating or stealing. He said no, he hadn't. And his excuse for that was he didn't quite understand the question; I guess that's what it was. And [45] he is also under a capital murder charge at this point in time because he blew it in his second statement, he didn't mention the rape, so he's sitting here with two capital murder counts on him and he wants you to believe him.

It's important, because if he can't convince you at this point in time, then he stands to go to death, he stands to take the death penalty. And if that doesn't influence anybody's testimony, I don't know what does.

So what we have now is approaching the thicket. Mr. Cruse and Mr. Williams both say that Mr. Cruse has the .357 and Mr. Williams has the .38. They both say that they approach the victims and they line up. That's consistent with both statements. Mr. Williams tells you that he pulls the trigger on the .38, on Mr. Keller. He tells you that Mr. Cruse then pulls the .357 trigger on Mrs. Keller. All of that is consistent. They are both tracking the same.

What difference then is what happens next. Mr. Williams says he steps back, he says he leans over to get the gun from Mr. Cruse, he says he hears a rustle and he turns and see Mr. Keller has stood up, at that point in time that Mr. Cruse grabs the weapon and starts to fire. Again, all of that is consistent with the evidence. And what you have is just a contest from here as to who is telling the truth. In this situation we talk about who [46] knew, who was going to have to leave witnesses or not leave witnesses. You've got both of them, both of them have had their faces shown, and it's an instant reaction. And I submit to you that it's certainly possible for Mr. Cruse to have gotten that weapon, fired the weapon at Mr. Keller again, fired the weapon at Mrs. Keller again, completely.

Now, we submit, and our theory is, obviously, that Mr. Cruse fired all three shots that killed Mrs. Keller. Certainly the .357; he admits that. That was a lethal bullet, Dr. Kay said. We also say that because he grabbed

the .38, he fired the other two shots into Mrs. Keller. We also have Mr. Williams testifying that he fired a .38 shot at Mr. Keller, but Mr. Keller stood back up. Dr. Kay testified that one of those wounds might not have been lethal. And we would submit that based upon the evidence that you see, when Mr. Keller stood up, that the wound that she said was possibly non-lethal, the one that came right to left, from here to here (indicating), was the one that he fired, Mr. Williams fired from the .38, and that once Mr. Cruse got the .38, that the other two wounds that he received, the head wounds which were lethal in and of themselves, were fired by Mr. Cruse.

And I would submit to you that Mr. Cruse is lying, that he certainly has a motive to lie, just as much as Mr. Williams. And I think upon those facts, with both [47] parties having the motivation to lie, that that leaves a reasonable doubt in your minds as to the capital murder charge.

Now I'm not suggesting that Mr. Williams is not guilty, that because of my scenario he walks, he gets off of murder. He's guilty of first degree murder on both counts.

Now this is the last opportunity that I'm going to have to speak to you. The Commonwealth has a chance to come up here and offer rebuttal testimony – or a rebuttal argument, excuse me. Not testimony, because nothing we say is evidence, is it? But one thing I want to keep in your minds, because this is it for me, if you will recall from Mr. Cruse's testimony, the Commonwealth asked him on redirect, "Is there any difference between what you're telling the Jury now and what you told the police," and he said

no. And I submit to you the question that you need to ask is, and the appropriate question was, "Was that the truth," what he told you and what he told the police, because he's told them so many times, you cannot possibly tell. And again, I thank you for your attention.

MR. VON SCHUCH: May it please the court. Good morning, ladies and gentlemen. You've seen me during the course of the trial. I'm the Deputy Commonwealth's Attorney for Chesterfield County. When this thing [48] occurred. Mr. Woodson had asked me if I would help him put this together and I agreed to do that, and come out and do that, and as you can see, it does take two attorneys to work on this thing.

I thought about this evidence and I had occasion to watch yesterday as the family of the Kellers came up and the family of Mrs. Williams came up to identify the property and I asked him if I might have an opportunity to talk to you as well at this time, and he graciously agreed to let me do that.

The purpose of my coming here is to rebut what Mr. Ford has told you. Now we have the right to do this because the Commonwealth has the burden of proof, so we get to have the last say. What I wanted to do, first of all, was talk to you about what Mr. Ford had told you the burden of proof in this case was, and you've heard about it from the first day; that the Commonwealth has the burden of proving to you that the defendant is guilty beyond a reasonable doubt. And those are the keys words, and that is the standard by which you measure every element that is listed for the offenses in the instructions.

And I know the first question that you ask is, "What does that mean?" It is a full page instruction and it could probably go on for two pages to explain it, [49] but if I can cut through it and I can make it easier for you, I can help you by saying it this way. If applying your common sense to what you heard from the evidence, you believe the defendant is guilty, then the Commonwealth has proven it's case beyond a reasonable doubt. If applying your common sense to what you heard from the evidence, you believe that the defendant is not guilty or guilty of a lesser offense, then the Commonwealth has not met its burden.

Now, the important thing about that is that it is included in the same instruction as the defendant's presumption of innocence and it's important that they are taken together. Now, presumption of innocence I know is something this Jury has heard of before it walked in this Courtroom today. Every defendant who has ever been tried in a criminal case in this country has been presumed to be innocent. But I will tell you, as soon as you apply your common sense to this evidence and you believe the defendant has committed these crimes, he has no more presumption of innocence and that's why they are included together in that same instruction.

Now what Mr. Ford and Mr. Woodson have told you essentially is this; the defendant is guilty of arson, the defendant is guilty of two counts of robbery, the defendant is guilty of two counts of abduction, the [50] defendant is guilty of burglary. By his own testimony. There's no dispute about that. The only dispute is about the rape and whether he is guilty of first degree murder or capital murder. And I would tell you this, that from the thirty-

some odd witnesses of the Commonwealth, from the forty-some odd exhibits of the Commonwealth, there is no dispute in this evidence over the defendant's guilt of rape or capital murder.

The only dispute in this evidence comes from the testimony of the defendant himself, and that's what I want to talk about. Well, I noticed when Mr. Ford stood up and talked to you, he indicated to you that it was a privilege to represent Michael Williams. Well, let me tell you, neither Mr. Woodson nor I will ever say that it is a privilege to have a relationship with Jeffrey Cruse or Mr. Williams.

But there is a difference between the two of them. Michael Williams went into the house and did all those horrible, disgusting things you heard about and wore Mr. Keller's jacket to Florida, and wore it all the way back in the police car. And when I asked him why, he just didn't get it. He said, "Well, he was already dead." That's what it meant to him. It's like stepping on bugs. Not one bit of remorse during his testimony. And now we have a new language. When you break into people's houses [51] and you steal things, when you break into their cars and steal things, it's finding. That's what Michael Williams is like. Jeffrey Cruse is different. Not different enough that he wouldn't do the same things Michael Williams did, but different enough to feel bad about it, different enough to talk to the police about it.

He told you about an incident that occurred several weeks ago when I had laid out one of those pictures which you had seen of the Kellers in the woods. I asked him what happened and he said he lost it, and, boy, did

he ever. And when he got on the witness stand here, he broke down again, when Mr. Ford pushed him and then when he was asked questions by me.

When he was arrested on that concealed weapon charge, and you heard the officers testify, there wasn't a single thing that they could have charged him with about these offenses, not a single thing, but he went ahead anyhow and told the police and got himself charged with it. Apparently Mr. Cruse feels bad. He at least has that much conscience. And that is a big difference between this (indicating defendant) and Mr. Cruse.

Mr. Ford is absolutely correct. When Mr. Cruse came down the first time, when he wanted to talk, when he told us, when we had no choice but to enter into that agreement, because anything he said we were going to [52] charge him with, because we didn't have any other way of charging him, and he did not tell about the rape and Mr. Woodson went back and tore up the agreement. And he sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. And like he told you right now, his back is against the wall; if he lies, he dies, and that is his situation.

And that's where he's coming from when he comes into this courtroom. Now he's different, you see, from Mr. Williams, because Mr. Cruse's testimony makes Mr. Williams guilty of capital murder, makes him guilty of rape. If Mr. Williams does not lie, he is guilty of these offenses. There is a difference between the two of them. The last question I asked Mr. Williams on cross examination was, "The truth of it is, Mr. Williams, the truth of it is that if

Jeff Cruse hadn't told on you, you wouldn't be here on trial today, would you?" And he said that's the truth.

Now where is Mr. Williams coming from? You don't think he doesn't have a motive to get back at Jeff Cruse? You don't think he doesn't sit there with that on his mind? If Jeff Cruse hadn't told the police what happened and hadn't taken them to the river, this man is walking around out there and he's still got his .38. Think about what's in Mr. Williams' mind when he's up here telling you this story.

[53] Actually, between Mr. Williams and Mr. Cruse, you can see who's telling the truth by looking at the other evidence, as Mr. Woodson pointed out. Mr. Williams got on that witness stand – First, he walked over there and placed his hand on a Bible, then he came over here and sat on that witness stand and looked at you and told you that he did not rape that woman. And I asked his specifically, "I want to be sure, I want to be clear, I don't want any question about it. You're sitting there and you're telling this Jury right now that you did not rape that woman?" And he said yes.

George Li found that if Michael Williams and Jeff Cruse raped Mrs. Keller, that they would both be in there, that Mr. Cruse's pattern would cover up Mr. Williams', but they could both be in there if they raped. "Well, gosh, Mr. George Li, how do we know for sure then that he really is in there?" Well, you see, then we go back to Lisa Schiermeier, because she wasn't measuring DNA, remember, she was typing the seminal fluids and she found a mixture.

Now, Mr. Ford has told you – and she showed you the chart – Mr. Ford has told you, "Well, there was a 2- in there, but as Ms. Schiermeier told you, that's a large percent of the population." Well, I don't care about the population, I care about the three possible people, the [54] only possible people, the only people who were in that house that night. That's what I care about. Which one of those three was a -2? I don't care about the rest of the world, because they didn't rape, they didn't have sex with Mrs. Keller. I care about the ones that were there that night. And is Jeffrey Cruse a -2? No. Is Mr. Keller a -2? No. The only one of those four people that was detected as a 2- in that mixture was this man over here, and that's how we know George Li found him in the DNA and that's how we know he is lying.

So now what do you believe about Mr. Williams? Well, then I asked him on cross examination. "You sit there and you tell me that you fired only one shot, is that right?" And I said, "Is that the same kind of truth as the truth you're telling us about raping Mrs. Keller?" And he looks me right in the eye and he says, "Yes." And he's right, it is about the same kind of truth. It's kind of like "finding."

It's funny though that when he stands up there, when he has every motive to lie, he tells you that he only fired one shot. But on the way back from Georgia with Officer Holt, when for the first time he finds out Jeff Cruse has told them the whole story, what does he say? "Oh, geez, Officer Holt, you know, I only fired that one shot," or how about, "Well, geez, Officer Holt, you know, [55] he had the .38 and shot everybody." Does he say that? No. The first words out of his mouth are, "Jeff Cruse

had the goddamn Black Hawk." He said, "I can prove it," and in a way we could, because Jeff Cruse said that there were two bullets in there and he fired one of them and there still should be one in there. And when the gun was found, Ann Jones says there was one, just one, .357 Ruger bullet like the jacketed bullet that was found in Mrs. Keller.

You know, the reality for Jeff Cruse is that from the first day, when he told us that he fired that shot into Mrs. Keller, from that point on it didn't matter to him what else happened, because he was guilty of capital murder as a matter of law and as a matter of fact. So it doesn't matter to him whether he fired one shot, six shots, all the shots, or some of the shots. When he testified that he fired that first shot, he had already put himself in the pot, so he doesn't have any reason to lie. He doesn't have any motive to protect himself, he has already done it to himself when he says he killed Mary Elizabeth Keller and he fired that shot.

Looking at the evidence from the light most favorable to Mr. Williams – and let me say this to you. If you believe the Commonwealth's evidence in this case, you don't have any issues to decide. If you believe everything Mr. Williams told you – let's assume for a [56] minute that that happens. What about capital murder? Can he still be guilty of capital murder? Yes. Even under his own theory of facts. He admitted that he fired a shot into Morris Keller. Mr. Ford has told you he believes that to be the shot that did not enter his brain, that went through his cheeks behind his mouth. It's a shot that he was able to jump up from. Dr. Kay told you, and we had asked her a number of time – and I would ask you to recall her

testimony – about that being lethal or potentially lethal. And she had indicated that all of the gunshots contributed to his death.

"Well, what about that one? Could that one do it, just by itself?" She said, do you recall, "It could. I don't know. You'd have to wait and see what happened." And I showed her the autopsy report where she had listed, Cause of Death – Gunshot wounds, multiple gunshot wounds, and I said, "Did you include in the cause of death, when you say multiple gunshot wounds, this gunshot wound to the head from which he could have staggered to his feet from," and she said, "Yes." That's been the evidence.

And if you understand that, I would direct you to the jury instruction number 18. It says, "You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the [57] fatal shooting," and we're talking about Morris Keller, "if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death." And I would submit to you that inflicting a gunshot wound into Mr. Keller that contributed to his death, by the expert testimony of Dr. Kay, is sufficient for you to find him guilty of capital murder of Morris Keller, even if you believe everything he says.

I don't want to take a lot more of your time. Like Mr. Woodson, I thank you. I would like to say one thing; we have done a lot of talking here today about Mr. Williams and Mr. Cruse. There are other people involved in this case, and that's why I asked to come up here, because

insofar as Morris Keller was concerned, I had listened to the testimony of Ann Jones and I had noted the position of Morris Keller as he was found draped over his wife.

He had suffered one gunshot wound to the left side of his face and that was the side that was exposed. It was a close gunshot wound; someone put the gun right up almost in contact to the side of his face and shot him there. It was consistent with the residue pattern on the back of his shirt that he was shot in that position. To me, that means that he was in that position from those [58] wounds and that was the last shot that was put into his brain. There's nothing that Mr. Keller ever did in his life, that I know about, that justified that happening to him. Privilege? No, no, not Mr. Williams or Mr. Cruse, Mr. Ford. I'm sorry. Privilege maybe to know the Kellers, yeah. Maybe that's a privilege.

And then this case is also about Mary Elizabeth Keller. Now I don't know, and I can't tell you, I don't know whether she grabbed that marriage certificate after being raped twice at gunpoint in her own house, being led out in the woods, knowing that she was going to die, because she was trying to tell everybody that, "No matter what they do to me, I'm still Mrs. Keller," or whether she was really concerned about maybe, "I want them to know who we are when they find us." I don't know. But there is nothing that she ever did in this world that justified what happened to her.

Mr. Woodson has told you this is a maximum case. I hope I have emphasized that with these examples. I thank you very much.

* * *

VIRGINIA:
IN THE CIRCUIT COURT FOR
THE COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

INSTRUCTION NO. 14

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant and Jeffery [sic] Alan Cruse killed Mary Elizabeth Keller; and

(2) That the killing was willful, deliberate and premeditated; and

(3) That the killing of Mary Elizabeth Keller occurred during the commission of robbery while the defendant was armed with a deadly weapon;

AND/OR

(4) that the killing of Mary Elizabeth Keller occurred during the commission of, or subsequent to, the rape of Mary Elizabeth Keller.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that Jeffrey Alan Cruse was the person who killed Mary Elizabeth Keller then

you shall find the defendant guilty of first degree murder and fix his punishment at:

(1) Imprisonment for life; or

(2) A term of imprisonment of not less than twenty (20) years.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

[Given /s/ J. Snoddy]

INSTRUCTION NO. 15

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) that the defendant killed Morris C. Keller, Jr.;

(2) That the killing was willful, deliberate and premeditated; and

(3) That the killing of Morris C. Keller, Jr. occurred during the commission of robbery while the defendant was armed with a deadly weapon;

AND/OR

(4) That the killing of Morris C. Keller, Jr. occurred during the commission of, or subsequent to, the rape of Mary Elizabeth Keller;

AND/OR

(5) That the killing of Morris C. Keller, Jr. occurred as part of the same act or transaction in which the defendant also killed Mary Elizabeth Keller.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that Jeffrey Alan Cruse alone killed Morris C. Keller, Jr. then you shall find the defendant guilty of first degree murder and fix his punishment at:

(1) Imprisonment for life; or

(2) A term of imprisonment of not less than twenty (20) years.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

[Given /s/ J. Snoddy]

INSTRUCTION NO. 16

Willful, deliberate, and premeditated means the adoption of a specific intent to kill. The intent to kill must come into existence at some time before the killing, but need not exist for any particular length of time.

[Given /s/ J. Snoddy]

INSTRUCTION NO. 17

You have been instructed on more than one grade of homicide and if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant, and find him guilty of the lesser offense.

[Given /s/ J. Snoddy]

INSTRUCTION NO. 18

You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal shooting, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death.

[Given /s/ J. Snoddy]

INSTRUCTION NO. 19

You are instructed that the word "only" as it is used in Instruction No. ___ means that Jeffrey Alan Cruse was the immediate perpetrator, that is, the one who fired the fatal shot, in the killing of Morris C. Keller, Jr.

[Refused /s/ J. Snoddy]

INSTRUCTION NO. 20

As part of the Commonwealth's burden of proving the offense of capital murder, you have been instructed that the Commonwealth must prove beyond a reasonable doubt that the defendant was the individual who killed the victim. Where evidence of more than one person's involvement in the crime is offered, only the person responsible for the actual infliction of mortal wounds may be convicted of capital murder. A suspicion of guilt, no matter how strong, is insufficient to convict the defendant of the offense of capital murder.

[Refused /s/ J. Snoddy]

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths present that MICHAEL WAYNE WILLIAMS on/or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

> did, willfully, deliberately and with premeditation, feloniously, kill and murder Mary Elizabeth Keller in the commission of robbery of Mary Elizabeth Keller [and Morris C. Keller /s/ J.S.] while armed with a deadly weapon in violation of Section 18.2-31(4) of the Code of Virginia, 1950, as amended

We, the jury, find the defendant guilty of Capital Murder of Mary Elizabeth Keller as charged in this Indictment.

/s/ Bonnie B. Stinnett
FOREMAN

or

We, the jury, find the defendant Michael Wayne Williams guilty of first degree Murder of Mary Elizabeth Keller and fix his punishment at:

FOREMAN

OR

We, the jury, find the defendant Michael Wayne Williams not guilty.

_____

FOREMAN

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths present that MICHAEL WAYNE WILLIAMS on/or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

did, willfully, deliberately and with premeditation, feloniously, kill and murder Mary Elizabeth Keller subsequent to [the rape of /s/ J.S. Mary Elizabeth Keller in violation of Section 18.2-31(5) of the Code of Virginia, 1950, as amended

We, the jury, find the defendant guilty of Capital Murder of Mary Elizabeth Keller as charged in this Indictment.

/s/ Bonnie B. Stinnett
FOREMAN

and/or

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths present that MICHAEL WAYNE WILLIAMS on/or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

did, willfully, deliberately and with premeditation, feloniously, kill and murder Morris C. Keller, Jr. subsequent to [The rape of /s/ J.S] Mary Elizabeth Keller in violation of Section 18.2-31(5) of the Code of Virginia, 1950, as amended

We, the jury, find the defendant guilty of Capital Murder of Morris C. Keller, Jr. as charged in this Indictment.

/s/ Bonnie B. Stinnett
FOREMAN

and/or

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths

present that MICHAEL WAYNE WILLIAMS on/or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

did, willfully, deliberately and with premeditation, feloniously, kill and murder Morris C. Keller, Jr. in the commission of robbery of Morris C. Keller, Jr. [and Mary Elizabeth Keller /s/ J.S.] while armed with a deadly weapon in violation of Section 18.2-31(4) of the Code of Virginia, 1950, as amended

We, the jury, find the defendant guilty of Capital Murder of Morris C. Keller, Jr. as charged in this Indictment.

/s/ Bonnie B. Stinnett
FOREMAN

and/or

VIRGINIA:

COUNTY OF CUMBERLAND, TO-WIT:

In the Circuit Court of the said County, the Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said Court for the said County, upon their oaths present that MICHAEL WAYNE WILLIAMS on/or about the 27th day of February in the year nineteen hundred and ninety-three in the said County and within the jurisdiction of said Court, and within one year prior to the finding of this indictment.

did, willfully, deliberately and with premeditation, feloniously, kill and murder Morris C. Keller, Jr. and Mary Elizabeth Keller as a part of the same act or transaction in violation of section 18.2-31(7) of the Code of Virginia, 1950, as amended.

We, the jury, find the defendant guilty of Capital Murder of Morris C. Keller, Jr. as charged in this Indictment.

/s/ Bonnie B. Stinnett
FOREMAN

or

We, the jury, find the defendant Michael Wayne Williams guilty of First Degree Murder of Morris C. Keller, Jr. and fix his punishment at:

_____

_____
FOREMAN

OR

We, the jury, find the defendant Michael Wayne Williams not guilty.

_____
FOREMAN

_____

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

Trial – Day Four
January 6, 1994

* * *

[85] MR. WOODSON: Your Honor, the Commonwealth would like to submit for the record the prior conviction, criminal convictions of Michael Williams, and we have the Court Orders here, Your Honor, and I'd like to read them to the Jury, if I could, and then I'll submit them to the Court.

THE COURT: All right.

MR. WOODSON: Ladies and gentlemen, in the Circuit Court of Cumberland County on September 27, 1983 – this is a conviction order, Commonwealth of Virginia versus Michael Williams. I will just briefly tell you what the conviction is for, unless the defendant wants me to read the entire Court Order.

MS. CARRICO: No.

MR. WOODSON: This conviction is for the unauthorized use of a vehicle having a value of less than $200.00, and Mr. Williams was convicted in Cumberland on September 27, 1983 of that charge.

[86] Then on April 14, 1989, in the Circuit Court for the City of Richmond, Mr. Williams was convicted for the possession of methamphetamine, a Schedule II controlled substance. That's a felony conviction in the Circuit Court of the City of Richmond, April 14, 1989.

On that same date in the Circuit Court of the City of Richmond, on April 14, 1989, Mr. Williams was also convicted of grand larceny, which is another felony.

These are what the conviction orders would show and I'd like to submit these as the next Commonwealth's exhibit.

THE COURT: Gentlemen, is it all right to make these one exhibit?

MS. CARRICO: No objection.

THE COURT: Now, you all realize I don't want those in the same – I'll start these A, B, C, if that's all right. Commonwealth's Exhibit A, consisting of three convictions.

* * *

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

* * *

[87] The witness, JOHN HOWARD WILLIAMS, having first been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Good afternoon. I'm going to ask you, if you would, to speak up very load so this gentleman all the way back here can clearly hear you.

A Okay.

Q Would you give the ladies and gentlemen of the Jury your name, please?

A John Howard Williams.

Q And are you related to the defendant in this case, Michael Williams?

A Yes.

Q And what is the relationship between the two of you?

A I'm his brother.

Q Now, again, could you keep your voice up. How old are you, Mr. Williams?

A Twenty-three.

Q And how is your brother at this time?

A Twenty-six.

[88] Q He would be your older brother then?

A Yes.

Q Have you and your brother lived in Cumberland County?

A Excuse me?

Q Have you lived in Cumberland County for a number of years?

A Yes, we have.

Q All your life?

A Practically.

Q Were you raised in the same home that your brother, Michael Williams, was?

A Yes, I was.

Q Do you have any prior criminal record?

A No, I don't.

Q You've never been convicted of a felony or a misdemeanor involved lying, cheating or stealing?

A No, I have not.

Q Can you indicate to the ladies and gentlemen of the Jury the educational level that you've achieved?

A Excuse me?

Q Can you indicate how far you've gone in school?

A Two years of college.

Q What college was that, that you attended?

[89] A Valley Forge Christian College.

Q Did you have occasion to be home from college on Christmas of 1992?

A Yes, I did.

Q And did you have occasion to be with your brother that Christmas Eve afternoon, the 24th?

A Yes, I was.

Q And that would be Michael Williams?

A Yes.

Q Can you tell us where the two of you had gone that afternoon?

A We drove to Farmville.

Q Again, I'm going to have to ask you to speak up so all of these –

A We drove to Farmville.

Q And what did you do in Farmville?

A We rode around for a while and then we went back to a friend's house.

Q Who was the friend's house that you went back to?

A George Atkinson.

Q Had you met him while you were out or were you planning just to stop by and visit him?

A First we stopped by his mother's house to look for him and she told us that he wasn't living there no [90] more, so we gave him a phone call, but his dad said he wasn't in, so we decided not to go see him. We then went to the Wal-Mart store in Farmville and he happened to walk in while we were there and we started talking to him.

Q Was George Atkinson, Jr. a friend of yours?

A He was a friend of my brother's.

Q How long had he been your brother's friend?

A Several years.

Q What was your relationship with him? Was he just your brother's friend or did you like him, too?

A No, he was also a friend of mine.

Q When you ran into George Atkinson, Jr., where did you all decide to go?

A First we were going to go to some party or something, but we decided to go back to his house first so he could get cleaned up.

Q Now, you, I think, at this time – I'm just kind of guessing, from what you've said, that his mother and father lived in different places?

A That's what I gathered, because they had two different houses, right.

Q When you went back with George Atkinson, Jr., was that his mother's house or his father's house?

A His father's house.

Q Do you know where that's located?

[91] A In Rice.

Q And would that be in Prince Edward County?

A I guess so.

Q Do you know what time it was that you and your brother, Michael, and Mr. Atkinson, Jr. got back to the house?

A Somewhere around maybe 5:00 or 6:00.

Q Was there anybody else there when you all got there?

A His father.

Q What did you do when you got back there? What were the four of you doing?

A We were drinking.

Q Can you describe the layout of the house, in terms of is it a single story house?

A Single story.

Q And what room were the four of you in?

A The living room.

Q Is there a bedroom in that house?

A I'm sure there is.

Q Do you know where it is in relationship to the living room?

A It was down a hall.

Q Were you in that living room when Mr. Cutter and Mr. Villalobos came into that house?

[92] A Yes, I was.

Q And now there were six of you in the house, if my math is right?

A Yeah.

Q What were you all doing at that time?

A We were still drinking.

Q Do you know how long it was that you were sitting there drinking and talking before you, I guess, passed out?

A We had been drinking for a while before we got there, then when we got there we were drinking, also. I don't know, maybe an hour or two hours before I passed out. I don't know.

Q From the last thing that you remember, had there been any problems in the house between any of the parties in the house?

A Not that I know of.

Q Now tell us what happened; what's the next thing that you remember?

A Being in my car; riding in my car.

Q What was your condition at that time?

A I was going in and out, passing out, and I was very sick and I was very cold.

Q And you were in your car?

A Yes.

[93] Q Who else was in the car with you?

A My brother.

Q Michael Williams?

A Yes.

Q And what happened as you were driving alone?

A The car ran hot and so we stopped and made a fire.

Q What was your condition?

A I was still the same way.

Q What about the condition of your clothes?

A I was really wet.

Q Do you know how you got wet?

A At that point, no, I didn't.

Q Do you know whether or not that bedroom had a waterbed in it?

A I was told so.

Q You don't remember going back to that bedroom?

A No, I don't.

Q Now, as you stopped and made a fire, did Mr. Williams, your brother, start to tell you what had happened in the house?

A In between me passing out and waking up, yeah.

Q And what did he tell you happened in the [94] house after you had – Did you go back to the bedroom by yourself, do you recall?

A I guess I was carried back there.

Q Tell us what your brother told you happened in that house after you passed out and didn't remember.

A Well, I passed out right after the two other gentlemen came in and then, evidently, they had been doing several different things; you know, just talking and stuff, still. I believe my brother was still talking to Mr. Atkinson some. And then, evidently, a confrontation broke out between my brother and Villalobos, at which time Villalobos had a handgun and placed it –

Q Had a handgun?

A Yeah, and placed it towards my brother.

Q Did you see any handguns in that house when you went in there?

A I never saw a handgun, no.

Q Did you ever see a gun cabinet of any sort?

A Yes, I did.

Q Did you take a look at it and see what types of weapons might have been in that gun cabinet?

A I didn't look. It was across the room from me and I didn't get up and walk over to it.

Q Did your brother indicate to you whether or not he had ever met or known Villalobos before?

[95] A He never knew him.

Q And so he told you that Mr. Villalobos had this handgun. What was he doing with it?

A After they got into a confrontation, he put it in my brother's face and he made several threats.

Q Did your brother ever tell you what the confrontation was supposedly about?

A No.

Q What happened after Mr. Villalobos put the gun in your brother's face and was making threats?

A Somehow the gun got put down and then my brother was yelling for me to come out of the room so we could leave, but I never responded, because I was passed out. And then Villalobos and Cutter turned and started going down the hallway to where I was.

Q What did your brother do when they started moving towards the hallway which led to the bedroom, I guess?

A He picked up the gun and went back and shot Mr. Villalobos.

Q What did he indicate to you had happened to Mr. Cutter at that time?

A Mr. Cutter jumped at my brother, so my brother had turned and shot him.

Q Now, Mr. George Atkinson, Jr. was still in [96] the house and Mr. George Atkinson, Sr. was still in the house. What did he indicate happened next?

A Well, the Sr. also, I believe, came towards my brother and he also got shot.

Q Did your brother ever indicate to you anything about Mr. Atkinson, Sr. calling the police or doing something?

A All I know is when he started shooting, he started coming. I don't know exactly what happened.

Q And where did your brother go after that?

A To the room where I was.

Q And what happened when he got back to the room? What did he indicate to you? What did he tell you he did?

A He came into where I was, where I had passed out at. George Atkinson, Jr. was passed out next to me.

Q That's his friend?

A Yes.

Q And when he came in there, he then shot George Atkinson, Jr.

Q Did he tell you why he did that?

A Just that, you know, with everything going on so fast and everything, it was like, you know, that he was also there; he felt that we were threatened.

Q Well, is that what he told you?

[97] A He told me that he came in there and also he had known that his father – His father had been shot and that he had to shoot him, also.

Q Let me just ask you this. Do you remember testifying in Prince Edward County at the preliminary hearing?

A Yes.

Q And let me ask you; do you recall being asked by Mr. Ennis as to why your brother told you he shot George Atkinson, Jr.?

MS. CARRICO: Your Honor, I object. He's impeaching his own witness. He's called Mr. Williams as his own witness.

MR. VON SCHUCH: I'm just seeing if I can refresh his recollection, Your Honor.

MS. CARRICO: I believe he's trying to impeach him with a prior inconsistent statement.

MR. VON SCHUCH: He hasn't made an inconsistent statement at this point.

THE COURT: He hasn't said anything.

MS. CARRICO: Please note my objection.

MR. VON SCHUCH: I'm sorry; I know what I'm referring to. I'm sorry.

[98] BY MR. VON SCHUCH: (Continuing)

Q Now, what was the next thing that your brother told you happened?

A He then picked me up. Well, me and George, Jr. both sunk into the waterbed and he pulled me out and carried me out to my car.

Q And did he tell you why he burned the house down?

A Excuse me?

Q Did he tell you why he burned the house down?

A Yeah. They'd have his DNA and he burned the house down so there would be no record that we were there.

Q Do you remember what time it was you got home?

A Well, after we broke down, first off I was like freezing, so my brother called a police officer. He dialed 9-1-1 and –

Q After he had shot all these four people, he called a police officer?

A Yes, he did.

Q What did he tell the police officer?

A Well, I was freezing to death; I was wet and it was very cold, Christmas Eve, so he called the cops because he was scared I was going to freeze to death. So [99] the police officer came and put me in the car so I could warm up.

Q And did you manage to get home after that?

A Yes, I did. My father came and picked us up.

Q Now, Mr. Williams, did you have occasion to be home again from college on February 28th, that weekend that the Kellers were killed?

A Yes, I was.

Q And who was it that went to Richmond to pick up the defendant on that occasion?

A I did.

Q And did the defendant have any weapon with him at that time?

A At that time?

Q Yes.

A Yes.

Q And what was that?

A It was a handgun.

Q Do you know anything much about handguns?

A I know nothing about handguns.

Q You saw the handgun that he had?

A Yes, I did.

Q Was that the same handgun? Did you see a handgun – You didn't see a handgun in Prince Edward [100] County?

A I wouldn't remember.

Q That was the only handgun you've seen him with?

A I have no idea. It was a half a year between the two. I don't remember what gun looks like what.

Q When you returned to Cumberland County, where did your brother go?

A He came back to the house with me.

Q And how long did he stay in Cumberland after that?

A He spent the night.

Q Did he flee the jurisdiction?

A I'm sure he did; he got picked up in Georgia.

Q Were you at the house when there was some discussion about him leaving?

A No, I wasn't.

Q When did you go back to college?

A I never got back to college.

Q Did you stay at the house after that?

A I was arrested.

Q For your involvement or potential involvement in Prince Edward County?

[101] A For being at Prince Edward when the Prince Edward case happened.

Q Let me ask you this. Did there come a point in time when you came to the Cumberland County Police Department?

A Excuse me?

Q Did there come a time when your father brought you down here to the police department in Cumberland County?

A No.

Q Can you hear me?

A No, he never brought me to the Cumberland County Police Department.

Q How did you get in contact with Officer Tyree?

A After I was arrested, he met me at the Prince Edward Courthouse.

Q And did you come and make a statement to the police about what happened in Prince Edward County, as well as what happened in Cumberland County?

A After I was arrested, yes, I did.

Q And did you do that voluntarily, on your own?

A Yes, I did.

Q No one brought you down, no one dragged you [102] in; you came down on your own and told what you knew at that time about what Michael Williams had done, correct?

A Yes, I did.

MR. VON SCHUCH: That's all the questions I have, John. Would you please answer any questions that Ms. Carrico has?

MS. CARRICO: No questions, Your Honor.

THE COURT: You may step down.

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

* * *

[108] The witness, WILLIAM MASSELLO, III, M.D., having first been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. VON SCHUCH:

Q Good afternoon, Dr. Massello. Would you give the ladies and gentlemen of the Jury your name, please?

A William Massello, M-a-s-s-e-l-l-o.

Q Are you employed, Dr. Massello?

A Yes, I am.

[109] Q And where and in what capacity?

A I am a forensic pathologist. My job title is Assistant Chief Medical Examiner for Western Virginia, and I work in Roanoke.

Q And what do you do, essentially, in that capacity?

A As I mentioned, I'm a forensic pathologist, and this is a doctor who specializes in death investigation. And pursuant to the Code of Virginia, our office investigates all violent deaths or suspicious deaths which take place in the western part of the state. And we do this by examining dead human bodies, interpreting patterns of

wounding, performing autopsies or internal examinations of the body, and also doing some special things, such as looking at organs and tissue under the microscope and interpreting tests for poisons and drugs.

Q Dr. Massello, did you have occasion in that capacity to perform an autopsy on Mr. Villalobos?

A Yes, I did.

Q Can you tell the ladies and gentlemen of the Jury what the results of your examination were, please?

A Yes. Jeffrey Villalobos had a gunshot wound to the back of the right side of the head. I'm indicating the approximate location with my index finger. And this bullet went in a forward direction, going slightly right to [110] left, into the head and into the brain, and caused damage to the brain in its passage and, as such, resulted in the gentleman's death. In addition, of course, there were burns to the body, charring of the skin, and this involved approximately seventy to ninety percent of the body surface, or at least three-fourths of his body and nearly a hundred percent of his body.

Q Could you make any determination of whether the burning was pre- or postmortem?

A This was after death.

Q Did you have occasion to have pictures of Mr. Villalobos in the condition that he was as you received him in the morgue?

A Yes, I do.

Q And do they depict the gunshot wound that you have described?

A Yes, they do.

MR. VON SCHUCH: I would offer them at this time as a Commonwealth's Exhibit.

MS. CARRICO: Your Honor, I'm going to object to the introduction of the pictures at this time. I think they're inflammatory.

MR. VON SCHUCH: Judge, the Commonwealth has the burden of proving items which require the introduction of these pictures. We're past the [111] trial on the case. We're now where we have the burden to show vileness, et cetera. That can only been done in this way; I'm sorry. I don't know any other way to do it.

THE COURT: The motion is overruled.

MS. CARRICO: Judge, if you would note our exception to your ruling, please.

THE COURT: Four pictures, and I'm going to make them one exhibit. Do you all have any objection to that? I'm making four pictures one exhibit.

MS. CARRICO: Your Honor, I would like to have an opportunity to view those pictures. Judge, I'm going to renew my objection. We're here on the penalty phase of the Cumberland case and I think that these pictures are inflammatory and we're not trying him on vileness for what happened in Prince Edward. I think that these are unduly prejudicial to Mr. Williams to be introduced and I do object to their introduction, at least to all four of them.

THE COURT: One shows the bullet entry; I'm certainly going to allow that. I'm going to allow two.

MS. CARRICO: Your Honor, if you would note [112] our exception to your ruling.

THE COURT: You're still excepting?

MS. CARRICO: Yes, sir.

THE COURT: I'm going to allow these two as Exhibit D.

BY MR. VON SCHUCH: (Continuing)

Q Dr. Massello, would you explain the pictures, please?

A Would you like me to show the pictures?

Q Yes. Describe the injuries that you noted.

A I'm showing you two pictures here and both of them are Commonwealth's Exhibit D. The first picture is the face of the gentleman whom I performed the autopsy on, and it's taken mainly for identification purposes, but I think you can appreciate that there is blackening and charring of the skin, resulting from the effects of heat and fire.

The second part of the exhibit, the second picture, shows the back of the right side of the victim's head. This is the right ear over on this part of the picture that I am pointing to, and here is the hair, which is black, and there has been an area shaved in the back of the head which shows a gunshot wound entrance. And as opposed to being a round hole, that you would expect a [113] bullet to make, this is a very ragged, sort of star-shaped appearing wound, and this is from the effects of the muzzle of the gun being held in contact with the head at the time of

discharge, so that the gases, in addition to the bullet, actually come out of the gun and get underneath the scalp and cause splitting of the skin an they expand. So this, then, is a gunshot wound entrance with the muzzle of the gun in contact with the head.

Q Thank you, Dr. Massello. Did you have occasion to recover a bullet or a bullet jacket from the track of the wound to Mr. Villalobos?

A Yes, I did.

Q And can you describe exactly what it was that you recovered?

A Yes. This was, I believe, a jacket – A bullet and a jacket. In other words, this was a bullet which had a copper, they call it a jacket. The best way to call it is a copper sleeve or something like that, which is around it, and the bullet had actually sort of expanded or deformed itself into the shape of a mushroom when it was removed from the head. And this is what we call an intermediate caliber bullet, such as you would get with a .38 caliber bullet, a .357 bullet, or a nine millimeter caliber bullet.

Q Was that item turned over to Detective [114] Reesee for delivery to the lab?

A Yes, it was.

Q Do you have an autopsy report concerning the deceased in this case, Mr. Jeffrey Villalobos?

A Yes, I do.

MR. VON SCHUCH: Judge, I would offer that as a Commonwealth's Exhibit at this time.

THE COURT: That's E.

BY MR. VON SCHUCH: (Continuing)

Q Let me ask you then, if you would, to turn to the case of William Barton Cutter.

A Yes, I've got that.

Q Can you tell us, please, did you have occasion to perform the autopsy on the deceased in this case, Mr. William Barton Cutter?

A Yes, I did.

Q Can you tell the ladies and gentlemen of the Jury what you noted, please, in terms of injuries to Mr. Cutter?

A Yes. The most significant injury was a gunshot wound to the front of the face; and this actually went into the face through the nose, through the right side of the nose, and then went straight back through the face into the brain, and in passing through the brain, it went [115] through a part of the brain which we call the brain stem. This is the area of the brain that controls all of our vital functions, such as breathing, consciousness, heart rate, blood pressure, et cetera. And in injuring the brain stem or passing through it in this way, it resulted in the virtual instantaneous death of this individual.

The bullet continued its passage through the brain stem part of the brain, went through the back of the skull and came to lodge right beneath the scalp at the approximate location that I'm indicating with my index finger. At that point then, the bullet was recovered. Additionally to this injury, there were also burns, again virtually over the entirety of the individual's body, and there were some

very, very superficial cuts to the skin, as if a sharp type of an object, such as glass or sharp metal, razor blade, knife, what-have-you, had actually made some cuts on the top of the left side of the individual's forehead, the left eyelid, and then right above the right eyebrow, as I'm indicating with my left index finger here.

Q Could you determine whether the cuts were premortem or postmortem?

A No, I couldn't determine that.

Q Again, with the burning, was that indicated to be premortem or postmortem?

A The burning was postmortem.

[116] Q Did you have occasion to recover a bullet from the gunshot wound track which you noted in Mr. Cutter?

A Yes, I did.

Q And can you describe that for the ladies and gentlemen of the Jury?

A Again, this was an intermediate caliber copper jacketed bullet which had sort of mushroomed in its passage; the type of ammunition, again, .38 caliber, .357 caliber bullet, or a nine millimeter.

Q Do you have occasion to have pictures of the gunshot wounds to Mr. Cutter, please?

A Yes, I do.

MS. CARRICO: Judge, I am going to note an objection to the introduction of any pictures. I believe

that they are inflammatory and prejudicial. I think the same evidence can be shown by the Commonwealth by a diagram and I think these are unnecessarily inflammatory.

MR. VON SCHUCH: Judge, could we have a recess and discuss this, please?

THE COURT: Yes.

* * *

[121] (The Jury entered the Courtroom, and in the presence of the defendant and counsel, the following ensued.)

BY MR. VON SCHUCH: (Continuing)

Q Dr. Massello, I think I was at the point where I was asking you if you had a picture of Mr. Cutter to demonstrate and explain the gunshot, and so forth and so on. Would you show them that, please.

[122] A Yes. This is a picture of the decedent. What you note right away is that the front of the face, again, is blackened, and there are areas where the skin has actually blistered or peeled off, exposing the underlying white skin. But if you look there at the tip of the nose, you will see a large ragged area, and this is a wound, a bullet wound, which has been charred by fire; which, again, goes through the right nostril, through the face, and into the head, causing instantaneous death.

And I mentioned cuts on the face. This photograph does show one, where I'm indicating with my index finger, above the eyebrow and there is also a cut on the –

correction, above the left eyebrow – and then a cut on the right eyebrow, as I'm indicating with my finger.

Q And Dr. Massello, that is marked as what Commonwealth's Exhibit?

A Exhibit H.

MR. VON SCHUCH: Judge, I would offer that at this time.

BY MR. VON SCHUCH: (Continuing)

Q And I'm sorry, I forgot where I was. Did I ask you about a bullet being recovered in the gunshot wound track?

A Yes, you did.

[123] Q All right. Do you have a copy of the autopsy report involving Mr. Cutter?

A Yes, I do.

MR. VON SCHUCH: Judge, I would offer that at this time as a Commonwealth's Exhibit.

THE COURT: This is Commonwealth's Exhibit I.

BY MR. VON SCHUCH: (Continuing)

Q And I would ask Dr. Massello to remove his report concerning Mr. Atkinson, Sr. Do you have the report concerning George Atkinson, Sr.?

A Yes, I do.

Q Did you have occasion to perform the autopsy on that deceased, Mr. George Atkinson, Sr.?

A Yes, I did.

Q Can you explain to the ladies and gentlemen of the Jury what injuries you noted, please?

A Yes. Once again, this gentleman had a lethal gunshot wound, which entered through the upper lip, as I am indicating with my index finger, and then the bullet actually passed through the face once again, into the skull, going right through that vital part of the brain, which we call the brain stem. Actually, this, as opposed to being the upper brain stem, this was the lower brain stem, where your brain connects to your spinal cord.

[124] It actually cut this right in half, so there would have been complete, instantaneous paralysis of all of the muscles of his body, including the muscles going to the tongue and the breathing muscles, and virtual instantaneous death resulting from an injury to this part of the brain. The bullet, as I mentioned, went through that part of the brain we call the brain stem and then didn't stay in the head in this case, but actually exited the skull and exited the body through an exit wound located on the left side of the neck, which I am trying to indicate with my left index finger for you.

Q Did you have occasion to recover any fragments or jackets or anything of that nature in the track of the wound?

A I did not recover a bullet. I recovered some very, very small fragments or metallic chips of the bullet.

Q As in the case of Mr. Cutter and Mr. Villalobos, were these given to Officer Keesee for delivery to the lab?

A Yes, they were.

Q Do you have a picture of the injury to the deceased in this case, Mr. George Atkinson, Sr.?

A Yes, I do.

Q Would you show the ladies and gentlemen of [125] the Jury the entrance wound to the deceased? Again, was there burning on this –

A Yes. As well, there were burns involving near completely the entire body. The photograph, again, this is the decedent, and this area here, right below the nose – there's the mouth, there's the nose – and this is a very large hole here. And this particular wound, of course, has been subject to burning by a fire, so it appears somewhat distorted.

But this is the entrance wound right through the upper lip and, of course, the bullet, as I mentioned, went straight back through the teeth, through the gums, into the face, into the brain, and out the back of the head.

Q That has a Commonwealth's Exhibit number on it, is that correct?

A That is Commonwealth's Exhibit F, yes.

MR. VON SCHUCH: Judge, I would offer that at this time as a Commonwealth's Exhibit.

BY MR. VON SCHUCH: (Continuing)

Q Do you have occasion to have the autopsy report of Mr. George Atkinson, Sr.?

A Yes, I do.

MR. VON SCHUCH: I would offer that at this [126] time as a Commonwealth's Exhibit.

THE COURT: That would be Commonwealth's Exhibit J.

BY MR. VON SCHUCH: (Continuing)

Q Finally, Dr. Massello, would you remove your file concerning George Atkinson, Jr.?

A Yes, I do.

Q Did you have occasion to perform the autopsy on the deceased in this case, Mr. George Atkinson, Jr.?

A Yes, I did.

Q Can you tell the ladies and gentlemen of the Jury what you had occasion to note concerning injuries to the deceased, Mr. Atkinson, Jr.?

A Yes. Once again, this gentleman had gunshot wounds; two gunshot wounds as opposed to a single gunshot wound.

Q Was this the only victim that had two gunshot wounds?

A Of the four victims I examined, yes.

Q Tell us about these two gunshot wounds, please.

A Yes. Now there were two wounds. One wound entered the body in this location, right here above my left eye and to the outside of it. It actually went in a front-[127] to-back, left-to-right direction, as I'm trying to indicate with my finger. It went into the brain and injured the brain. And as such, in injuring the brain, it caused death. And as I said, it penetrated the brain and came over on the right side of the brain, where the bullet was recovered.

The second gunshot wound was to the left lower eyelid, right below the wound I just described to you, in this approximate location. And this bullet went in a left-to-right trajectory, as I'm indicating with my finger, and actually went through the face. It didn't actually go into the brain or the head area, it went through the face and exited on the right side, in front of the right ear. And in doing so, a wound like this, of course, over a period of hours, if left untreated, can kill you. But in this particular case, that was not the lethal wound; the lethal wound was the first wound I described to you above the left eyebrow.

Now both of these wounds, despite the fact that there was also extensive burning of the body, you could discern what we call stippling. And this stippling is little, tiny red spots, or little, tiny puncture marks of the skin that are made by fragments of metal or fragments of gunpowder. When a gun is fired, a lot more comes out than just a bullet; you'll also get smoke, you [128] also can get hot pieces of gunpowder and hot bits of metal stripped from the surface of the bullet or the inside of the barrel. And these, if they hit the skin, they will leave very small, little red marks. And both of these wounds had these, or in the general area of both of these wounds there were these little red marks.

So this would indicate that the gun was within a short distance, it was not a great distance away from the body. It was within, say, two and a-half feet or three feet of the body, or perhaps just a matter of inches, at the time one or both of these shots was discharged. So what we have here are two close range gunshot wounds to the left side of the head.

Q Do you have a picture of those as they were inflicted?

A Yes, I do.

Q Maybe the picture will show better than your description of the location.

A Yes. This is the left side. Commonwealth's Exhibit G shows the left side of the decedent's face. And up on the lateral aspect of the eyebrow you can see the first entrance wound I described, with the bullet going into the head and into the brain and causing death. And right on the lower eyelid, you can see another entrance wound; the bullet having inflicted this going through the [129] face and exiting on the right side in front of the ear. And it is somewhat difficult, because of the lighting, to actually see the stippling I was talking about, but if you look on the blistered area, or the white area of skin, you can see some very small little marks, and this is the stippling that indicates the muzzle of the gun was close to the face at the time of discharge.

And, of course, in addition we have areas of charring and burning of the skin on the left side of the face.

Q Is there a Commonwealth's Exhibit number on the back of that, please?

A Commonwealth's Exhibit G.

MR. VON SCHUCH: I offer that at this time.

BY MR. VON SCHUCH: (Continuing)

Q Do you have a copy, again, of the autopsy report of George Atkinson, Jr.?

A Yes, I do.

MR. VON SCHUCH: Judge, I would offer that as a Commonwealth's Exhibit at this time. (Commonwealth's Exhibit K.)

THE COURT: Before we get to this; as I understand it, you are offering these as to the future dangerousness of this man?

[130] MR. VON SCHUCH: Yes, sir.

THE COURT: And I want to explain to the Jury, you are not to take this into consideration as to the vileness of the crime, and so forth, that was committed here, for which you have tried today. You are not to consider that for the vileness prone. You recall there are two prongs; one as to the future dangerousness and the other one of the vileness, and so forth. This goes to the future dangerousness of the person, and that's what it's put in for, as I understand it, to corroborate the evidence of Mr. Johnny Williams.

MR. VON SCHUCH: That's correct, Judge.

BY MR. VON SCHUCH: (Continuing)

Q Dr. Massello, there were two wounds. Can you indicate to us, were there exit wounds associated with either one of those entrance wounds?

A Yes. As I mentioned, the entrance wound to the left lateral eyebrow went into the brain and there a bullet was recovered. The one to the lower eyelid went through the face and exited on the right side and no bullet was recovered.

Q The gunshot wound that the bullet was [131] recovered from, what did you have occasion to do with that?

A This was given to Investigator Keesee.

Q For delivery –

A To the firearms people at the Division of Forensic Science in Richmond.

MR. VON SCHUCH: Dr. Massell, would you answer any questions, please, that counsel has?

MS. CARRICO: No questions, Your Honor.

THE COURT: You may be excused. Doctor.

* * *

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

[Caption Omitted In Printing]

We, the jury, on the issue joined, having found the defendant guilty of Capital Murder of Morris C. Keller, Jr.

and

having unanimously found after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

and/or

having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mine [sic] or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder

and having considered the evidence in mitigation of the offense, unanimouly [sic] fix his punishment at death.

/s/ Bonnie B. Stinnett
FOREMAN

OR

We, the jury, on the issue joined, having found the defendant guilty of Capital Murder of Morris C. Keller, Jr. and having considered all of the evidence in aggravation and

mitigation of such offense, fix his punishment at imprisonment for life.

_____

FOREMAN

We, the jury, on the issue joined, having found the defendant guilty of Capital Murder of Mary Elizabeth Keller

and

having unanimously found after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

and/or

having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mine [sic] or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder

and having considered the evidence in mitigation of the offense, unanimouly [sic] fix his punishment at death.

/s/ Bonnie B. Stinnett
FOREMAN

OR

We, the jury, on the issue joined, having found the defendant guilty of Capital Murder of Mary Elizabeth Keller and having considered all of the evidence in aggravation

and mitigation of such offense, fix his punishment at imprisonment for life.

_____

FOREMAN

_____

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF CUMBERLAND

COMMONWEALTH OF VIRGINIA

v.

MICHAEL WAYNE WILLIAMS

THE HONORABLE JOHN R. SNODDY, JR., PRESIDING

Sentencing
Cumberland, Virginia
February 22, 1994

* * *

[23] THE COURT: Stand up, Mr. Williams. Do you have anything that you would like to say or any reason why judgment should not be rendered?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

THE DEFENDANT: I mean, I'd just like to say I'm sorry to all the family members and all that. I mean, I know I did something terrible and, I mean, I know I deserve to die for it, but I mean – I mean, I know I did wrong, but in Prince Edward I didn't go there to kill anybody. I mean, the guy pulled the gun on me and I lost my head.

My head was messed up when I got to Cumberland and I did that. I mean, I ain't never done nothing like that before in my life. I mean, I'm just [24] asking for the

mercy of my mother. I know I deserve to die, because I did something horrible, but I didn't go to Prince Edward to kill nobody. I mean, I held the gun to George – I mean, I shot George, my best friend. I mean, I loved him like a brother. I grew up with him. I mean, I stood there for, I know, fifteen minutes. I mean, I couldn't do it. I didn't go there to kill anybody. I'm just asking for the mercy of my mother. I mean, I know I deserve to die and all that, I know I did something terrible and all that, I'm just asking for my mother's sake.

And I want to say I'm sorry to all of the families in Prince Edward and I want to say I'm sorry to the ones in Cumberland, but I mean, I didn't – I mean, in Cumberland I went there to do a robbery and I know I was wrong, I was extremely wrong, but in Prince Edward, I mean, I didn't go there to kill anybody. I mean, I was there, I was partying –

THE COURT: Of course, this is concerning the Cumberland case.

THE DEFENDANT: I mean, I went to Cumberland and did a robbery and I know I was wrong, and I just wanted to say I was sorry.

THE COURT: Well, as we all know, the Jury found Mr. Williams guilty and the Court affirms their findings. [25] And based on the evidence that the Court heard, the verdicts of the Jury, and the matters contained in the report made by one of my probation officers in pursuance of Section 19.2-264.5 of the 1950 Code of Virginia, as amended, I find that the sentences of death as recommended in the verdicts of the Jury are appropriate and just in these cases, and I hereby sentence you to

death in the manner prescribed by law, and the execution of said sentence shall be set for the 20th day of April, 1994. And you shall forthwith be transported to the Virginia Corrections System. So you are sentenced to two death penalties. That's what the Jury did and I'm going to affirm it. That's all. Court is adjourned.

* * *

THE COURT: The Court was delivered, prior to the hearing, a letter from Michael Williams. The letter was delivered by his attorney, Mr. Don Ford. And having shown it to the Commonwealth's Attorneys and again to Mr. Ford, the Commonwealth's Attorneys having no objection, this is also made a part of the record, this letter which I have marked delivered and filed February 22, 1994 and with my initials to it.

WHEREUPON, the proceedings were concluded.

[Letter Originally Handwritten]

[February 22, 1994 /s/ J.S.]

Mr. Snoddy,

Im wrighting this letter to tell you that I'm sorry for All Ive done. I really am sorry I no that I've done a lot of terrible things in my life and I want to tell the family's of the victims that Im sorry to I no they wont forgive me but I want to tell them anyway what I've done Isn't forgiveable and I can understand why you would want to give

me the death penalty and I can understand why the family's of the victim's want me to have it to, I deserve it and probally worse to, but I'm never going to see the street's again with how much time I have and if I had life in Prison I feel that with all Iv'e done in my life I could talk and help somebody. Mr. Snoddy I no that this letter looks like Im trying to get out of the death penalty and your right I am but not for me. Its for my mother Mr Snoddy my mother loves me more than anything in the world I no I deserve to die I can except that because of the terrible things that I've done but my mother can't Mr. Snoddy I'm asking for her please. If you can find the mercy in your hart please spare me for my family I've caused enough Pain allready I dont want to cause anymore. the reason that I wrote this letter is whenever I try talking my mind just goe's blank because theres so much I want to say I just want everybody to no that I'm not like the Press makes me out to be I do show remor just because I don't cry doesn't mean I don't hurt for them I wrote these other letters for the victims familys to let them no how sorry I am Id like for them to have them so that they would no I am sorry for what I've done.

/s/ Michael Williams

LAW OFFICES
MORCHOWER, LUXTON & WHALEY

NINE EAST FRANKLIN STREET
RICHMOND, VIRGINIA 23219-2105
(804) 643-0147
Fax: (804) 648-5514

[Names And Addresses Omitted In Printing]

October 30, 1995

Sheriff Claude Meinhard
County of Cumberland
P.O. Box 71
Cumberland, VA 23040

RE: *Commonwealth of Virginia v. Michael Wayne Williams*

Dear Sheriff Meinhard:

I have been appointed to represent Michael Wayne Williams who was convicted of capital murder in your County in 1994.

I would like to meet with members of your department who were involved in the investigation and who testified at his trial. I would also like to review the investigative files of those employees.

I will be out of town from October 31 through November 9 and will contact you upon my return to discuss the appropriate arrangements.

With thanks for your cooperation and with best regards, I am

Very truly yours,

/s/ Eric D. White
Eric D. White

EDW/thj

cc: Mr. Michael Wayne Williams
Barbara L. Hartung, Esquire

LAW OFFICES

MORCHOWER, LUXTON & WHALEY
NINE EAST FRANKLIN STREET
RICHMOND, VIRGINIA 23219-2105
(804) 643-0147
Fax: (804) 648-5514

[Names And Addresses Omitted In Printing]

October 30, 1995

Sheriff Gene Southall
Prince Edward County
P.O. Box 25
Farmville, VA 23901

RE: Commonwealth of Virginia v. Michael Wayne Williams

Dear Sheriff Southall:

I have been appointed to represent Michael Wayne Williams who was convicted of capital murder in your County in 1994.

I would like to meet with members of your department who were involved in the investigation and who testified at his trial. I would also like to review the investigative files of those employees.

I will be out of town from October 31 through November 9 and will contact you upon my return to discuss the appropriate arrangements.

With thanks for your cooperation and with best regards, I am

Very truly yours,

/s/ Eric D. White
Eric D. White

EDW/thj

cc: Mr. Michael Wayne Williams
Barbara L. Hartung, Esquire

LAW OFFICES

MORCHOWER, LUXTON & WHALEY
NINE EAST FRANKLIN STREET
RICHMOND, VIRGINIA 23219-2105
(804) 643-0147
Fax: (804) 648-5514

[Names And Addresses Omitted In Printing]

October 30, 1995

Warren B. Von Schuch, Esquire
Commonwealth Attorney's Office
County of Chesterfield
P.O. Box 25
Chesterfield, VA 23832

Donald R. Curry, Esquire
Office of the Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

Re: Michael Wayne Williams v. Warden

Gentlemen:

Michael Wayne Williams was convicted of capital murder and sentenced to death in early 1994, after a jury trial in Cumberland County. I have been appointed to represent Mr. Williams on his state habeas petition and am being assisted by The Virginia Capital Representation Resource Center.

Pursuant to the new rule promulgated by the Supreme Court, I have until December 31, 1995, to file the habeas corpus petition in the Virginia Supreme Court. I can only assume that one or both of you have access to the prosecutorial files in this case. Given the time frame, I

decided to skip initial contacts by phone and make this formal request.

Recently, the United States Supreme Court decided *Kyles v. Whitley*, 1995 WL 227644 (April 19, 1995), a capital case that stated no new law but rather reaffirmed the prosecutorial obligations of disclosure set forth in a series of cases: *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and *United States v. Bagley*, 473, U.S. 667 (1985). The basic Brady principles include the following. 1) There is no distinction between exculpatory and impeachment evidence for Brady purposes. 2) The duty of disclosures exists irrespective of any request by the defendant. 3) All favorable evidence relative to guilt or punishment is material, and error occurs "if there is a reasonable probability" that with disclosure to the defense the result would have been different. In *Kyles* the Court explicitly stated that proof of materiality does *not* require proof by preponderance of the evidence that disclosure would result in *acquittal*. Nor does it require the defendant to demonstrate that the evidence would be insufficient to convict once the inculpatory evidence affected by the nondisclosure is removed from the case, i.e., materiality is not determined by a sufficiency of the evidence test. Moreover, materiality is to be judged by viewing all nondisclosed evidence collectively rather than item by item.

While reaffirming these basic principles, the *Kyles* court also emphasized the obligations imposed on prosecutors to weigh the net effect of all nondisclosed evidence, to *learn* of favorable evidence known to government agents (including police), and to make disclosure "when the point of 'reasonable probability is

reached.' " A prosecutor cannot avoid learning about evidence which may effect confidence in the outcome of the trial or the punishment. Moreover, a prosecutor has a continuing duty of disclosure. *Mooney v. Holohan*, 294 U.S. 103, 108 (1935).

The Rules of the Supreme Court of Virginia address these same concerns. DR 8-102(4) specifically requires the prosecutor or other government lawyer to "make timely disclosure . . . of the existence of evidence . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The Rules in EC 8-10 address the responsibilities of the prosecutor and include the following: "The prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused." *See Lemons v. Commonwealth*, 446 S.E.2d 158, 160-61 (Va. App. 1994). *Stotler v. Commonwealth*, 346 S.E.2d 39, 41 (Va. App. 1986).

Against this background, I am now requesting that you inspect and review all materials and evidence in the possession, custody or control of the Commonwealth or its agents pursuant to the principles of *Kyles/Brady* that are material to the issues of Williams' guilt or sentence for capital murder. These materials may include, but are not limited to, to the following:

1. All reports of physical or mental examinations, scientific tests, or experiments conducted in connection with the investigation of the offense, including but not limited to:

(a) All fingerprint and palmprint exemplars, fingerprint samples, comparisons and opinions of fingerprint experts, and all documents relating to those opinions;

(b) All psychological test or polygraph examinations performed upon any prosecution witness and all documents referring or relating to such tests;

(c) All ballistic tests and/or examinations conducted on any weapon or ammunition or portion thereof connected to the offense;

2. Any and all records and information revealing prior criminal convictions or guilty verdicts or juvenile adjudications, including but not limited to the "rap sheet" of each prosecution witness through the current date.

3. Any and all records and information revealing prior or subsequent misconduct, criminal acts, or bad acts of each prosecution witness, including without limitation allegations of criminal conduct of which the prosecution knows or through reasonable diligence should have reason to know.

4. Any and all such considerations or promises of consideration given during the course of the investigation and trial of this case by any law enforcement officials, including prosecutors or agents, police, or informers, to or on behalf of any witness the prosecutor called at trial, or any such consideration or promises expected or hoped for by any such witness at any future time. Such consideration refers to anything which arguably could be of value or use to a witness, including, but not limited to

formal or informal, direct or indirect, promises of leniency, favorable treatment, or recommendations or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, administrative or other matter involving the state or federal government, any other authority or other parties; payments or money, rewards or fees, witness's fees, and special witness's fees; provisions of food, clothing, transportation, legal services, or other benefits; placement in a special protection program, informer status of the witness, and letters to anyone informing the recipient of the witness's cooperation; recommendations concerning employment; and anything else which arguable [sic] could reveal an interest, motive, or bias in the witness in favor of the prosecution or against Williams' or act as an inducement to testify or to color the witness's testimony.

5. Any and all statements – formal and informal, oral or written – by the prosecution, its agents and representatives to any person (including counsel for such person) whom the prosecution called as a witness at trial pertaining in any way to the possibility, likelihood, course, or outcome of any government action – state or federal, criminal or civil – against the witness or anyone related by blood or marriage to the witness.

6. Any and all threats, express or implied, direct or indirect, or other coercion directed against any witness the prosecutor called at trial; criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against such witnesses, any probationary parole, deferred prosecution, or custodial status of any such witness; and any other pending or potential legal disputes or transactions involving any

such witness and the state or federal government, or over which the state or federal government had real, apparent or perceived influence.

7. A list of any and all requests, demands, or complaints made to the prosecution by the witness which arguably could have been developed on cross-examination to demonstrate any hope or expectation on the part of the witness for favorable State action in his behalf (regardless of whether or not the State had agreed to provide any favorable action).

8. Any material not otherwise listed which reflects or evidences the motivation of the witness either to cooperate with the prosecution or any bias or hostility against Williams.

9. A copy of all medical and psychiatric reports known to the prosecutor concerning any witness the prosecutor called at trial which arguable affected the witness's credibility, ability to perceive, or relate or recall events.

10. Any written or oral statements, whether or not reduced to writing, made by any potential prosecution witness which in any way contradicted or was inconsistent with or different from other oral or written statement he had made, and any such statements made by any person, whether a witness or not, which in any way contradicted, was inconsistent with, or difference from any statements made by a prosecution witness.

11. The names and addresses of all persons whom the prosecution, its agents and representatives believed

had relevant knowledge and/or information with reference to the offense of conviction but whom the prosecution did not call as witnesses at trial.

12. Copies of any and all records of law enforcement agencies reflecting intradepartmental disciplinary action taken against any law enforcement official who testified in this proceeding.

The following list of individuals who testified at the guilt phase for the Commonwealth are those in which we are particularly interested. We expressly request that you consider their testimony and relationship with the Commonwealth in view of the requests made in this letter: Jeffrey Alan Cruse, Jose Albert Lozano, Verna Lozano James.

In addition to the specific materials requested in paragraphs 1-12, please provide copies of the following material which were given to defense counsel prior to or at the time of trial (according to the transcript and/or correspondence):

1. Statements of any witnesses obtained by any law enforcement official prior to trial.

2. Criminal records of Jeffrey Cruse and any prosecution witnesses.

3. Autopsy report and "Summary and Comment" from Medical Examiner on the victims, Mr. and Mrs. Keller.

4. All Certificates of Analysis.

Finally, please provide copies of:

5. Any and all search and arrest warrants, if any, and supporting affidavits and returns.

6. A statement of whether any identification procedures (line-up, show-up, photo spread) were employed in Mr. Williams' case, the nature and date of each such procedure, the witness involved on each date and the result, and copies of all police reports of such procedures. Where a photo spread or line-up was employed, please provide a photograph where available. Please provide a copy of the photograph of Williams' used in any such procedure or during investigation of the offense.

I explicitly request that all files, records, evidence, and any materials related to this case be preserved whether those materials are now in your possession or in the possession of your agents.

I will be out of town from October 31, 1995 through November 9, 1995. I will follow-up upon my return. Your cooperation will be greatly appreciated.

Very truly yours,

/s/ Eric D. White
Eric D. White

EDW/thj
cc: Mr. Michael Wayne Williams
Barbara Hartung, Esquire

(SEAL)

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

[Address Omitted In Printing]

November 1, 1995

Eric D. White, Esquire
Morchower, Luxton & Whaley
Nine East Franklin Street
Richmond, Virginia 23219-2105

Re: Michael Wayne Williams

Dear Eric:

This is in response to your letter to Warren Von Schuch and me dated October 30, 1995. I have advised Warren, and he agrees, that because I am handling the habeas corpus proceedings in this case on behalf of the Commonwealth, I should be the one to respond to your letter.

First of all, I take issue with your assertion that under the Virginia Supreme Court's new rule – Rule 5:7A, which does not even become effective until November 15, 1995 – you "have until December 31, 1995, to file the habeas corpus petition in the Virginia Supreme Court." You have, in fact, already filed your petition in the Supreme Court and I have filed a responsive pleading. Your petition was accompanied by a motion for leave to amend which, as far as I know, remains pending. Whether the Court will grant leave to amend and, if so, how long it will give you to amend the petition, are thus open questions. Unless you have received information from the

Court that I have not, I do not believe there is any basis for your apparent assumption that you have until the end of the year to file an amended petition.

With respect to your request – much like the request a defense attorney might file when a criminal case is being prepared for trial – that Warren and I "inspect and review" all materials "in the possession, custody or control of the Commonwealth" for the purpose of identifying material, exculpatory evidence, we have no intention of doing so. Michael Williams' trial attorneys filed a lengthy request for exculpatory evidence prior to trial (R. 44) and the Commonwealth responded to the request at that time. This case, however, no longer is in a posture where the Commonwealth is a "prosecutor." You have filed a civil habeas corpus proceeding in which the Commonwealth is the defendant. I know of no authority that requires the Commonwealth, as the respondent in a civil habeas proceeding, to comply with such a request from petitioner's counsel.

As to your more general discovery request, please be advised that discovery in habeas corpus matters is governed by Rule 4:1(b)(5) and is not authorized "without prior leave of . . . court." As you know, the defense bar lobbied to have discovery provisions included within Rule 5:7A and the Supreme Court rejected those efforts. As a practical matter, moreover, I certainly do not see why the Commonwealth should now provide Williams with materials which, by your own admission, "were given to defense counsel prior to or at the time of trial."

Please let me know if you have any questions about the Commonwealth's position.

Very truly yours,

/s/ Don
Donald R. Curry
Senior Assistant Attorney General
Criminal Litigation Section

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

MICHAEL WAYNE WILLIAMS,

Petitioner.

v.

RONALD ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITIONER'S MOTION FOR EXPERT SERVICES

(Received Nov. 30, 1995)

Petitioner, Michael Wayne Williams, moves the Court for the appointment of (1) an attorney experienced and knowledgeable in the defense of capital cases in Virginia, to assist him as a potential expert witness, (2) a forensic neuropsychiatrist; (3) a ballistics expert to review the tests performed on firearms and bullets introduced at petitioner's trial and to conduct independent tests; and, (4) an investigator to examine issues relating to the testimony and status of the co-defendant, Jeffrey Cruse, and issues relating to the jury's consideration of this case.

I. THE RIGHT TO EXPERT SERVICES.

Under §14.1-183 of the Virginia Code, an indigent person may sue or defend a suit without paying fees or costs, and shall be provided with all "needful services and process" related to that suit. This statute is broadly worded, and covers the situation at hand. As discussed below, the expert services requested are necessary to petitioner's prosecution of his habeas corpus petition.

Such "needful services" should be provided to petitioner on the basis of Va. Code §14.1-183.

In addition, payment of such services is provided for in the Commonwealth's budget appropriations. The State's budget provides:

> (A) Out of the amounts for Pre-Trial, Trial and Appellate Processes shall be paid: (3) The State's share of *expenses incident to the prosecution of a petition for a writ of prosecution of a petition for writ of habeas corpus* by an indigent petitioner, including payment of counsel fees as fixed by the Court; the expenses shall be paid upon receipt of an appropriate order from a circuit court. (Emphasis added).

1993 Va. Acts of Assembly, Ch. 994, para. 26(3). This item clearly is not limited to counsel fees, since they are identified as only a type of reimbursable expense. Thus, the General Assembly has clearly authorized the payment of all other "expenses incident to the prosecution of a petition for a writ of habeas corpus."

Based on both §14.1-183 and the applicable sections of the 1991 Acts of Assembly, the trial Court has authority to order the Commonwealth to pay for any expenses necessary to an indigent petitioner's prosecution of a writ of habeas corpus.

Furthermore, in *Murray v. Giarratano*, 492 U.S. 1 (1989), six justices agreed that "collateral proceedings are a central part of the review process of prisoners sentenced to death." *Id.* at 14 (Kennedy, Jr., concurring). Those six justices (the four dissenters and Justices Kennedy and O'Connor, who concurred in the judgment)

recognized that, given the complexity of capital post-conviction jurisprudence, the provision of legal services to indigent prisoners under sentence of death was necessary to provide "meaningful access" to the post-conviction process. *Id.*

Justice Kennedy concurred in the judgment because "no prisoner on death row in Virginia has been able to obtain counsel to represent him in post-conviction proceedings . . . " 492 U.S. at 14-15. His decision upholding Virginia's system was predicted on his belief that Virginia did have a system for providing "meaningful access" that satisfied its constitutional obligations. *Id.* However, if Virginia's statutes are interpreted so as not to authorize payment for expert services essential to the prosecution of a habeas corpus petition by an indigent death sentenced prisoner, then it clearly is not satisfying its constitutional burden.

II. THE SERVICES NEEDED.

To prevail on any claim of ineffective assistance of counsel, petitioner must establish that his counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To establish that standard, expert testimony as to common practice in capital cases in Virginia is relevant. Thus, as to ineffective assistance claims raised in the habeas petition, the services of an attorney who is experienced in the defense of capital cases is appropriate.

Petitioner must also establish in an ineffective assistance of counsel claim that he was prejudiced by counsel's omissions. Petitioner alleges that trial counsel

should have investigated the plea negotiation, arrangements, discussions, meetings, etc. between the Commonwealth and petitioner's co-defendant, Jeffrey Cruse. Trial counsel did not call the co-defendant's attorneys as witnesses in an effort to determine the status of any plea arrangements, agreements or negotiations between the Commonwealth and Jeffrey Cruse. Counsel for the petitioner has been unable to locate Jeffrey Cruse to conduct an independent investigation into these issues. Counsel is advised by the Department of Corrections that the Department is unable to locate Jeffrey Cruse. This inability suggests arrangements or agreements which were not disclosed to petitioner prior to his trial. Clearly, the credibility of the testimony offered by the co-defendant, Jeffrey Cruse, was critical to the petitioner's defense.

A ballistic expert is necessary to review the tests done on the gun which was used in the commission of the crimes for which petitioner was convicted as well as all bullets recovered from the crime scene. No ballistic expert was employed by trial counsel. Clearly, such an expert would have been appropriate to insure effective cross-examination of the co-defendant, law enforcement officers, the medical examiner and the ballistics expert who testified on behalf of the Commonwealth.

Petitioner also alleges that irregularities, improprieties and omissions exist with regard to the empaneling of the jury. An investigator is necessary to examine all circumstances relating to the empanelment of the jury and the jury's consideration of the case. Petitioner is asking the court to appoint Doris Pye an investigator previously appointed by this Court in other capital cases to assist petitioner in this case.

While petitioner was assisted at trial by Dewey Cornell, Dr. Cornell is not a forensic neuropsychiatrist and is not qualified to assess any neurological or neuropsychological damage the petitioner may have sustained at birth as a result of oxygen depravation [sic] stemming from birthcord being wrapped around petitioner's neck. A cases to assist petitioner in this case. [sic]

While petitioner was assisted at trial by Dewey Cornell, Dr. Cornell is not a forensic neuropsychiatrist and is not qualified to assess any neurological or neuropsychological damage the petitioner may have sustained at birth as a result of oxygen depravation [sic] stemming from birthcord being wrapped around petitioner's neck. A forensic neuropsychiatrist would be able to conduct a full range of examinations to insure that petitioner was not deprived of his right to have relevant evidence in mitigation placed before the fact finder.

Similarly, expert psychiatric assistance is needed to support claims to be made concerning the preparation and presentation, or lack thereof of expert testimony during the sentencing phase of the trial. It is obviously impossible for petitioner to meet his burden of demonstrating prejudice under *Strickland* as to those claims without expert assistance. Thus, where mental health issues are raised in habeas corpus, expert services are necessary for the post-conviction process to be meaningful, and should be granted.

The allegations in the petition present a sufficient factual basis for this request.

Wherefore, petitioner moves this Court for appointment of expert services as described above.

MICHAEL WAYNE WILLIAMS

By /s/ Eric D. White
Counsel

[Certificate Of Service Omitted In Printing]

LAW OFFICES
MORCHOWER, LUXTON & WHALEY

NINE EAST FRANKLIN STREET
RICHMOND, VIRGINIA 23219-2105
(804) 643-0147
Fax: (804) 648-5514

[Names And Addresses Omitted In Printing]

HAND-DELIVERY

December 1, 1995

Donald Curry, Esquire
Senior Assistant Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

RE: *Michael Wayne Williams v. Angelone*

Dear Don:

I have been unable to locate Mr. Williams' co-defendant in Cumberland County, Jeffrey Allan Cruse. I will assume that you can appreciate the need for me to contact Mr. Cruse as well as his attorneys.

While I was able to obtain his inmate number, 215584, his date of birth, 12/11/67, and his social security number, 315-76-3445, the inmate locator service at the Department of Corrections advised that no other information was available.

Specifically, I was advised that Mr. Cruse's file is on "administrative verification" which is a paraphrase for protective custody. To get further information, I must go through Mr. Angelone. As Mr. Angelone is your client, I thought it appropriate to contact you.

The individual I spoke with at the inmate locator service, noting that the file on the computer didn't even reflect the nature of Cruse's convictions, commented that the file was "really locked up" and that someone "really didn't want him found". I want to speak to Mr. Cruse. I don't care where I speak to him but I think I am entitled to speak to him. I think I am also entitled to know the circumstances surrounding his entry into protective custody. I find it hard to believe that arrangements for this were not made prior to his testimony against my client in Cumberland County Circuit Court.

Since Mr. Angelone is your client and has the authority to disclose Cruse's location, I will expect to hear from you within a week. If I receive no response, I will assume that I have to petition the Supreme Court or the Circuit Court of Cumberland County for relief.

With best regards, I am

Very truly yours,

/s/ Eric D. White
Eric D. White

EDW/thj

cc: Mr. Michael Wayne Williams

[SEAL]

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

[Address Omitted In Printing]

December 11, 1995

Eric D. White, Esquire
Morchower, Luxton & Whaley
Nine East Franklin Street
Richmond, Virginia 23219-2105

Re: Jeffrey Cruse

Dear Eric:

This is in response to your letter dated December 1, 1995, concerning Jeffrey Cruse. Cruse, in fact, is imprisoned outside of Virginia. I will not reveal, however, his location to you or anyone else who might disclose the location to your client, Michael Williams.

With best wishes, I remain

Very truly yours,

/s/ Don
Donald R. Curry
Senior Assistant Attorney General
Criminal Litigation Section

VIRGINIA:

IN THE SUPREME COURT

MICHAEL WAYNE WILLIAMS,

Petitioner

v. Record No. 951589

J. D. NETHERLAND, WARDEN,

Respondent

OPPOSITION TO MOTION FOR EXPERT SERVICES

(Received Dec. 6, 1995)

The Warden, by his counsel, opposes the petitioner's motion for expert services, and says as follows:

1. This is a capital habeas corpus case where Williams filed his habeas petition in this Court on August 30, 1995. The Warden filed a motion to dismiss on September 8, 1995. The petition remains pending, as does petitioner's motion for leave to file an amended petition.

2. Williams now has filed a motion for expert services in which he has asked the Court to appoint the following: an attorney who is an expert in the trial of capital cases; a forensic neuropsychiatrist; a ballistics expert; and an investigator. The requests should be denied.

3. After acknowledging that he is not entitled to the appointment of the requested experts unless such appointments somehow are "necessary" or "essential" to his habeas case (Motion at 1-3), Williams merely argues

that such services would be "appropriate" or may produce "relevant" evidence. (Motion at 3-4). Clearly, the fact that an appointment might be "appropriate" or might produce "relevant" evidence is not the same as proof that the requested appointments are "necessary" or "essential" to his case.

Expert Attorney

4. Williams does not specify the connection, but suggests that the appointment of an expert attorney somehow is relevant to a claim that trial counsel should have investigated whatever plea arrangements there were between the Commonwealth and Williams' co-defendant, Jeffrey Cruse. No such claim, however, is articulated in the petition Williams has filed in this Court. Moreover, Williams has made no proffer that he has interviewed trial counsel and that trial counsel has informed him that the matter was not investigated. Quite to the contrary, the record shows that the plea arrangements between the Commonwealth and Cruse were disclosed fully at trial and that defense counsel were aware of them. (App. 935-977).[1]

5. Williams has proffered nothing to this Court that would support a conclusion that the appointment of an attorney expert is "essential" to his case. Indeed, if this Court were to grant Williams' request, there would be no principled way to deny such a request in any capital case.

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[1] The citation to the record refers to the Joint Appendix filed in this Court on direct appeal.

Forensic Neuropsychiatrist

6. Williams admits that, at his request, the trial court appointed Dr. Dewey Cornell to assist him at the time of trial. Dr. Cornell, a clinical psychologist, testified on Williams' behalf at the capital sentencing proceeding. *See Williams v. Commonwealth*, 248 Va. 528, 548-549, 450 S.E.2d 365, 378 (1994). Williams now contends that this Court should appoint him a neuropsychiatrist "to conduct a full range of examinations to insure that [Williams] was not deprived of his right [to present mitigation evidence]." (Motion at 5). In other words, Williams asks this Court to authorize a "fishing expedition" to see *whether* there was additional medical mitigation evidence that could have been presented but was not presented. Obviously, this Court should not license such an expedition. Williams has proffered nothing to this Court that could not be proffered by *any* death row inmate who is merely hoping to find additional mitigation evidence.

Ballistics Expert

7. Williams' motion regarding a ballistics expert is nothing short of frivolous. Williams and his co-defendant, Cruse, admitted that they shot the victims in this case. The ballistics evidence as to which of the victim's wounds were inflicted with which caliber weapon is undisputed, and indisputable. The issue in this case was not one of ballistics; rather, it was a question of which defendant shot which victim: if the jury believed Cruse's testimony, then Williams fired all five of the shots that killed Mr. Keller and two of the three shots that killed Mrs. Keller; if the jury believed Williams' testimony, then Cruse fired all

three shots that killed Mrs. Keller and all but one of the shots that killed Mr. Keller. (App. 915-919, 1205-1206). In short, the issue in this case was credibility, *not* ballistics.

8. Merely alleging that trial counsel should have employed a ballistics expert and asserting that this Court now should appoint such an expert to see whether trial counsel should have done so (Motion at 4), clearly is insufficient to warrant the relief Williams is requesting. Williams' proffer clearly would be insufficient to warrant the appointment of a ballistics expert to assist the defense *at trial*. *See Caldwell v. Mississippi*, 472 U.S. 320, 323-324 n.1 (1985). *A fortiori*, then, the proffer is insufficient to warrant such an appointment in a collateral, habeas proceeding.

Investigator

9. This request also is frivolous. Trial counsel requested an investigator and the trial judge denied the request. This Court affirmed that decision because the claim raised on appeal was not the same as the one Williams raised at trial. *Williams*, 248 Va. at 539, 450 S.E.2d at 373.

10. Now, Williams is requesting that this Court appoint a private investigator to interview the jurors in this case. In conclusory fashion, Williams alleges that there were "irregularities, improprieties and omissions . . . with regard to the empaneling of the jury." On the basis of such a conclusory allegation, which could be made by any prisoner in *any* case, this Court certainly should not authorize the expenditure of taxpayer funds

for an investigator to intrude upon the private lives of the jurors.[2]

11. Williams was not entitled to an investigator at trial because his proffer of need was conclusory and insufficient. (See attached order). *See, e.g., Gray v. Commonwealth*, 233 Va. 313, 331, 356 S.E.2d 157, 166-167, *cert. denied*, 484 U.S. 873 (1987). He certainly is not entitled to an investigator for his habeas proceedings on the basis of a similarly conclusory proffer.

Conclusion

Williams has failed to demonstrate that the experts he has requested are, in any reasonable sense, "necessary" or "essential." This Court, therefore, should deny his motion.

Respectfully submitted,

J. D. NETHERLAND, WARDEN

By: /s/ Donald R. Curry
Counsel

[Certificate Of Service Omitted In Printing]

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[2] Petitioner asserts that the person whose services he is requesting, Doris Pye, is "an investigator previously appointed by this Court in other capital cases." (Motion at 4). The Warden's counsel, however, is unaware of any instance in which this Court has appointed Ms. Pye, or any other investigator, in a capital case.

Virginia:

In the Circuit Court of Cumberland County.

Commonwealth of Virginia

Vs. Order

Michael Wayne Williams
SSN: 23025-0805
Birth Date: 1-25-68

Offense Date: 2-27-93

This 15th day of September, 1993, came to defendant, Michael Wayne Williams, with his counsel, R. Donald Ford and Lucretia Carrico, and presented to the Court his motion for appointment of an expert investigator; and also came the Attorneys for the Commonwealth for the County of Cumberland in opposition to said motion.

It appearing to the Court upon review of the aforesaid motion, argument of counsel, and order entered on September 15, 1993, denying at that time the defendant's motion for appointment of expert investigator and taking the motion under advisement for any further evidence which the defendant chose to offer in this matter, that there has been no evidence submitted by the defendant to establish the need for the appointment of an expert investigator, and therefore that such motion should be denied, it is therefore ordered that the motion is denied.

ENTER:

/s/ Illegible, Judge

DATE: Nov. 19, 1993

Seen and objected to:

/s/ R. Donald Ford
R. Donald Ford

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

MICHAEL WAYNE WILLIAMS,

Petitioner,

v. Record Number: 951589

WARDEN, MECKLENBURG
CORRECTIONAL CENTER.

Respondent.

MOTION FOR PRODUCTION OF JEFFREY ALLEN CRUSE AND DISCOVERY RELATING TO JEFFREY ALLEN CRUSE

Comes now the petitioner, Michael Wayne Williams, by counsel, and moves this Court to Order the Production by the Commonwealth of Virginia, Jeffrey Allen Cruse, the co-defendant of the petitioner who is currently incarcerated at an undisclosed location. Petitioner also moves this Court to Order that the Commonwealth produce all documentation relating [sic] the incarceration of Mr. Cruse from the date of his first incarceration in connection with capital murder charges in Cumberland County. In support hereof, counsel submits the following:

1. Jeffrey Allen Cruse was charged with capital murder of Mr. and Mrs. Keller in Cumberland County and was the co-defendant of the petitioner.

2. Cruse testified against the petitioner at petitioner's trial in Cumberland County Circuit Court which began on January 3, 1994.

3. The Commonwealth's case against the petitioner was based upon the testimony of Cruse.

4. The files of trial counsel as well as the record in this case do not adequately reflect information or discovery relating to plea agreements between the Commonwealth and Jeffrey Allen Cruse. Accordingly, counsel must talk to Mr. Cruse and obtain records relating to his incarceration.

5. By letter of December 1, 1995, counsel for petitioner advised the attorney general that he was unable to locate Mr. Cruse or obtain documentation because the Virginia Department of Corrections would not make such information available.

6. By letter of December 11, 1995, Donald R. Curry, Senior Assistant Attorney General, advised counsel that Mr. Cruse was imprisoned outside of Virginia, and refused to disclose his location.

Wherefore, petitioner moves this Court for entry of an Order directing the Commonwealth to produce Jeffrey Allen Cruse at a location to be chosen by the Attorney General and to provide counsel for the petitioner with documentation relating to the incarceration of Jeffrey Cruse since his first incarceration on charges of capital murder in Cumberland County.

MICHAEL WAYNE WILLIAMS

By /s/ Eric White
Of Counsel

[Certificate Of Service Omitted In Printing]

VIRGINIA:

IN THE SUPREME COURT

MICHAEL WAYNE WILLIAMS,

Petitioner

v. **Record No. 951589**

J. D. NETHERLAND, WARDEN,

Respondent

WARDEN'S OPPOSITION TO PETITIONER'S MOTION FOR DISCOVERY

(Received Jan. 16, 1996)

The Warden of the Mecklenburg Correctional Center, by counsel, opposes the petitioner's motion for discovery, and says as follows:

1. The petitioner has been sentenced to death for his role in shooting to death Mr. and Mrs. Morris C. Keller in Cumberland County in February of 1993. At petitioner's sentencing proceeding, the Commonwealth proved, and petitioner admitted, that he shot and killed four other persons in Prince Edward County in December of 1992. *See generally Williams v. Commonwealth*, 248 Va. 528, 547, 450 S.E.2d 365, 377 (1994).

2. Petitioner's co-defendant in the Keller murder cases, Jeffrey Cruse, testified against him at trial. For his protection, Cruse currently is incarcerated at a location outside of Virginia that the respondent has refused to disclose to petitioner. Petitioner now has filed a discovery motion in this habeas corpus proceeding, asking this Court for an order directing the respondent to make Cruse available to petitioner's counsel so that he may be

interviewed about the possible existence of plea agreements. Williams also asks the Court to order the respondent to produce "documentation relating to the incarceration of . . . Cruse since his first incarceration [for the Keller murders]." (Motion at 2).

3. Petitioner certainly is not entitled to discovery as a matter of right in this habeas corpus proceeding. Rule 4:1(b)(5); *Yeatts v. Murray*, 249 Va. 285, 289, 455 S.E.2d 18, 21 (1995) (habeas discovery is matter of judicial discretion). Nor has he shown specific facts warranting discovery in this case. Indeed, he has done nothing more than assert that Cruse testified against him at trial and that petitioner's counsel "must talk to Mr. Cruse and obtain records relating to his incarceration." (Motion at 2).

4. The trial record in this case demonstrates that the plea arrangements between the prosecution and Cruse were fully disclosed and that petitioner's trial counsel were aware of the relevant facts. (App. 935-977).* Indeed, although Cruse once had reached a conditional plea agreement with the Commonwealth by which he would be spared the death penalty, his failure to tell the prosecution about his involvement in the rape of Mrs. Keller resulted in the revocation of the agreement and, at the time Cruse testified against petitioner, there was no plea agreement in existence. (App. 976). *See Williams*, 248 Va. at 534, 542, 450 S.E.2d at 370, 374.

5. Petitioner has not proffered that he has interviewed trial counsel and that trial counsel were unaware

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* The citation to the record refers to the Joint Appendix filed in this court on direct appeal.

of the relevant facts. Nor has petitioner proffered that he has interviewed Cruse's trial attorneys, or that Cruse (or his attorneys) is likely [sic] consent to an interview by petitioner's counsel. Finally, petitioner has not demonstrated, or even alleged, that there is any reason to believe that the information which was presented at trial regarding Cruse's plea agreements, or lack thereof, was in any way inaccurate. Seen in the proper light, therefore, petitioner's discovery request is nothing but a request for this Court to sanction a proverbial "fishing expedition." *See Rakes v. Fulcher*, 210 Va. 542, 545-546, 172 S.E.2d 751, 755 (1970) (movant must demonstrate "good cause" for discovery).

6. Without the benefit of a plea agreement, Cruse took considerable risk in testifying against petitioner – a dangerous individual who has murdered no fewer than six persons. For Security reasons related to his protection from Williams, Cruse is incarcerated outside the Commonwealth. Petitioner clearly has failed to present any grounds that would warrant this Court ordering the respondent to provide Williams access to Cruse or to documents concerning his incarceration. *See generally Cardwell v. Director*, Record No. 951593 (Dec. 15, 1995) (denying discovery motion *inter alia*).

7. For the foregoing reasons, this Court should deny the motion for discovery.

Respectfully submitted,

J. D. NETHERLAND, WARDEN

By: /s/ Donald R. Curry
Counsel

[Certificate Of Service Omitted In Printing]

VIRGINIA

IN THE SUPREME COURT OF VIRGINIA

MICHAEL WAYNE WILLIAMS, #165709
Mecklenburg Correctional Center
Boydton, Virginia

Petitioner

v.

J.D. Netherland, Warden,
Mecklenburg Correctional Center
Virginia Department of Corrections
Richmond, Virginia

Respondent.

RECORD NUMBER: 951589

PETITION FOR WRIT OF
HABEAS CORPUS AD SUBJICIENDUM

Eric D. White
Morchower, Luxton & Whaley
Nine East Franklin Street
Richmond, VA 23219
(804) 643-0147
Attorney for Petitioner

* * *

D. COUNSEL DID NOT EFFECTIVELY INVESTIGATE OR CONFRONT THE PETITIONER'S CO-DEFENDANT, JEFFERY ALAN CRUSE, OR THE ISSUE OF CRUSE'S PLEA AGREEMENT WITH THE COMMONWEALTH.

* * *

138. Counsel failed to effectively investigate and confront the nature, extent and existence of the plea agreement between the Commonwealth and Jeffery Cruse. While there is no indication from the record or from counsel's files that counsel attempted to interview Cruse prior to trial.

139. There is nothing in the record or in counsel's files to suggest that counsel attempted to interview Cruse's attorneys regarding the nature, extent or existence of a plea agreement or what Cruse's attorneys may have told him about his testimony.

There is nothing in the record or in counsel's files to suggest that counsel ever interviewed James Baber, the first attorney who was appointed to represent Cruse at the time he entered the plea agreement. Counsel did not call either Commonwealth's Attorney, Von Schuch or Commonwealth's Attorney, Woodson, as a witness. As Von Schuch's questioning of Cruse addressed Cruse's dealing with the Commonwealth's Attorneys, both Commonwealth's Attorneys placed themselves in the position of being material witnesses.

140. Counsel did not subpoena either of Cruse's attorneys, Donald Blessing or Lee Harrison as witnesses. There is nothing in the record or in counsel's file to suggest that counsel discussed with any law enforcement

officers the nature, extent or details of any statements made by Cruse to law enforcement officers. (In fact, counsel failed to cross-examine Virginia State Police Agent Tyree regarding his interviews with Cruse or Cruse's reasons for obtaining a lawyer. Cross-examination of Tyree would have established that Cruse was never specifically asked about the rape during the statement in which Cruse omitted reference to the rape).

141. This substantial and extensive series of omissions and errors regarding the need to confront and investigate the most important witness in the Commonwealth's case at the guilt/innocence phase was undeniably deficient. The prejudice to the petitioner is clear: Cruse's testimony was essentially unimpeached and became the basis for not only the petitioner's convictions but his death sentences as well. It is clear that this ineffective attempt at impeachment renders the petitioner's sentences less reliable. As petitioner has established deficient performance and prejudice, he has established constitutional violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

142. Because the argument was made during rebuttal. Counsel had no opportunity to comment on, argue the implications of or otherwise pursue the Commonwealth's statement that if Cruse lies, he dies. Because counsel failed to object to that argument, the petitioner suffered from the prejudice that the jury was left with the self-fulfilling prophecy that petitioner is convicted, Jeffery Cruse must be telling the truth. Counsel's failure to object rendered his performance wholly deficient and ineffective. On this point, if counsel had objected, the result would surely have been different.

* * *

IV. THE PROSECUTION ENGAGED IN SUBSTANTIAL MISCONDUCT

408. Prosecutorial misconduct so infected the trial as to deny petitioner due process of law and to render the sentencing determination unreliable, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 8, 9, 11 of the Constitution of Virginia.

A. THE PROSECUTION FAILED TO PRODUCE MATERIAL AND EXCULPABLE EVIDENCE REGARDING THE CO-DEFENDANT JEFFERY ALAN CRUSE

409. On redirect examination of Cruse, Commonwealth's Attorney, Von Schuch questioned Cruse about his original statements to law enforcement authorities and the plea agreement which was entered into between Cruse, his attorney at the time, Mr. Baber, and Commonwealth's Attorney, Woodson. Von Schuch offered the written plea agreement as Commonwealth's Exhibit 13. (R. 975). Prior to trial, the Commonwealth did not provide counsel for petitioner with a copy of the agreement. *See* Affidavit of R. Donald Ford, Esquire, attached hereto.

410. Notwithstanding the prosecution's representations that the plea agreement was breached and, therefore, void, the only evidence on the point was the testimony of Cruse which came in through improperly

leading questions offered by Von Schuch. There is nothing in the record or in counsel's files to suggest or confirm that the plea agreement between Cruse and the Commonwealth had ever been rescinded, cancelled or terminated. There was never any suggestion nor is there any evidence of any assertion by the Commonwealth, Cruse, Cruse's lawyers or any law enforcement official that the original agreement, as written, notwithstanding its rough form, did not constitute a valid plea agreement.

411. The failure to produce the plea agreement left counsel with the impression that any plea agreement with Cruse was oral in nature. An agreement in writing certainly has more evidentiary value than an oral one. In this case, that assertion is particularly true given the fact that the jury was wrongfully lead to believe that the agreement was torn up after Cruse failed to mention the rape of Mrs. Keller in an earlier statement to law enforcement officers.

412. More importantly, the fact that the agreement was in writing and contained specific terms would have given counsel far more to work with in his examination of Cruse. The agreement provided the basis for some hope of benefit on the part of Cruse. Given the fact that his failure to mention the rape was not technically a breach of the agreement, the agreement remained a memorial to Cruse's hope of benefit for his testimony. Upon information and belief, Cruse did meet with Commonwealth's Attorneys after the alleged breach of the plea agreement.

413. A written plea agreement with a co-defendant who testifies for a lesser sentence is undeniably exculpatory. *See Brady v. Maryland*, 373 U.S. 83 (1963); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988) cert. denied. 489 U.S. 1033 (1989).

414. This error violated petitioner's rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 8, and 11 of the Virginia Constitution. The Commonwealth's failure to produce this evidence undermines confidence in the outcome of the trial. Timely disclosure of the relevant evidence would have made a life sentence more reasonably probable. *United States v. Bagley*, 473 U.S. 667 (1985).

B. THE COMMONWEALTH ALLOWED JEFFERY CRUSE TO MISREPRESENT THE NATURE AND EXTENT OF HIS CONTACTS WITH THE COMMONWEALTH'S ATTORNEYS PRIOR TO PETITIONER'S TRIAL

415. During cross-examination of Cruse, counsel for petitioner questioned the reason why Cruse was testifying. Mr. Cruse alleged that there was no deal for his testimony. The following exchange occurred:

> Q. AND YOU ARE SAYING, OR YOU ARE TELLING THE JURY, THAT THERE'S NO DEAL FOR YOUR TESTIMONY NOW?
>
> A. NO, THERE IS NOT.
>
> Q. THAT YOU JUST STAND THERE WITH A CAPITAL MURDER CHARGE AND THE ULTIMATE PENALTY AS DEATH?

A. THAT'S RIGHT.

Q. AND YOU ARE HERE ON THE STAND TODAY TO HELP YOURSELF MAKE YOUR CASE?

A. I AM GETTING IT OFF MY CHEST.

Q. YOU ARE GETTING IT OFF YOUR CHEST, BUT YOU ARE ALSO GETTING THE DEATH PENALTY OFF YOUR BACK, AREN'T YOU?

A. NOT REALLY.

Q. HAVE YOU TALKED WITH THE COMMONWEALTH'S ATTORNEYS ABOUT YOUR TESTIMONY?

A. WHAT DO YOU MEAN BY THAT?

Q. EITHER ONE OF THEM?

A. I AM SORRY? WHAT DO YOU MEAN BY THAT?

Q. IT IS JUST A SIMPLE QUESTION? HAVE YOU TALKED WITH THEM ABOUT YOUR TESTIMONY? HAVE YOU DISCUSSED WITH EITHER MR. WOODSON OR MR. VON SCHUCH WHAT YOU ARE TO TESTIFY TO TODAY? HAVE THEY GONE OVER YOUR STATEMENTS WITH YOU?

A. I WENT OVER IT WITH MY LAWYERS.

Q. WITH YOUR LAWYERS. HOW MANY TIMES HAVE YOU GONE OVER?

A. I AM NOT SURE.

416. This testimony was, at the very least, an incomplete statement and a misrepresentation as to the nature and extent of his contacts with attorneys prior to trial.

The Commonwealth Attorneys surely knew, having meet [sic] with Cruse just before trial to prepare him for trial, that Cruse had not been fully responsive and truthful. Had Von Schuch represented this to the Court, Cruse's testimony could have been called into question as being incomplete or self-serving as was his first statement when he omitted reference to the rape. As such, it was exculpatory. Failure to disclose this exculpatory evidence requires a new trial on the sentencing phase. *See Brady v. Maryland*, 373 U.S. 83 (1963); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988) cert. denied. 489 U.S. 1033 (1989).

417. The suppression of this evidence regarding the nature and extent of Cruse's contacts with Commonwealth Attorneys just before trial resulted in prejudice to the petitioner. Upon information and belief, either one or both Commonwealths attorneys meet [sic] with Cruse to discuss his testimony and to show him the layout of the courtroom. Implicit in these meetings is a spirit of cooperation which suggests some agreement between the Commonwealth and Jeffery Cruse. At the very least, the number, nature and extent of the meetings suggested a willingness on the part of the Commonwealth to offer some consideration and an expectation on the part of Cruse to receive some benefit as a result of his testimony against the petitioner.

418. Moreover, the Commonwealth's failure to reveal Cruse's omission and misrepresentation was intentionally designed to mislead the jury. Disclosure of that evidence would have made a different verdict or a sentence reasonably probable. *United States v. Bagley*, 473 U.S. 667 (1985). Such conduct on behalf of the Commonwealth violated petitioner's rights guaranteed by the sixth,

eighth and fourteenth amendments to the United States Constitution.

C. COMMONWEALTH FAILED TO REVEAL THAT THERE WAS, IN FACT, AN AGREEMENT WHICH WOULD PROVIDE CRUSE FOR A LIFE SENTENCE IF HE TESTIFIED AGAINST THE PETITIONER

419. After the petitioner's trial and formal sentencing hearing in which the trial court affirmed the verdicts of the jury, Jeffery Alan Cruse entered pleas of guilty to capital murder. At a subsequent sentencing hearing before the same trial judge, the court imposed life sentences on Jeffery Cruse for his involvement in the rape, robberies and murders of Mr. and Mrs. Keller.

420. Upon information and belief, Cruse entered his guilty pleas on a date which originally was scheduled for the purpose of hearing pretrial motions. Upon information and belief, no date was ever set for the trial of the charges against Cruse.

421. The proceedings on the guilty pleas and sentencing of Cruse transcribed. Counsel made an attempt to listen to said tapes but could not do so given the speed at which the tapes were originally recorded. Counsel has made arrangements to have the tapes transcribed and asks this court to accept the transcription of the proceedings as an exhibit hereto. Upon information and belief, the Commonwealth justified its recommendation of a life sentence for Cruse in part on his cooperation with the Commonwealth and his testimony against the petitioner. Upon Information and belief, the Commonwealth also

based its recommendation of a life sentence on Cruse in part on the "feelings of the family members of the victims, it being their feeling that the petitioner was more culpable.

422. The only evidence that petitioner was more culpable than Cruse came from Cruse himself. While the jury has a right to resolve matters of creditability against the petitioner, no one can say that Cruse was telling the truth. All that can be said in justification and affirmance of the verdicts was that Cruse was more credible than the petitioner. As Commonwealth's attorney, Von Schuch acknowledged in his closing argument at the guilt/innocence phase of the trial,

> Mr. Cruse came down the first time, when he wanted to talk, when he told us, when we had no choice but to enter into that agreement because anything he said we were going to charge him with, because we didn't have any other way of charging him and he did not tell about the rape and Mr. Woodson went back and tore up the agreement. R. 1277, 78.

423. It is critically important for this court to remember that nowhere in the record or in counsel's file is there any suggestion, indication or evidence that Jeffery Cruse was ever administered a polygraph examination to corroborate his story. Given that omission and the Commonwealth's problems in bringing charges, it chose to forge the relationship with Jeffery Cruse which resulted in a plea agreement.

424. There is certainly no basis in the record, including all the testimony heard at the petitioner's trial, to suggest that there is independent evidence which makes

petitioner more culpable than Cruse. In fact, Cruse acknowledged leading Mrs. Keller to the bedroom notwithstanding his assertion that it was petitioner's suggestion to rape Mrs. Keller.

425. As has been argued herein, Cruse's testimony against the petitioner was only self-proving. Because the jury chose to believe Cruse, Cruse got a life sentence. To suggest that there was no agreement at the time Cruse took the stand flies in the face of reason, the facts of this case and, most importantly, the argument of the Commonwealth's attorney. No one tore up that plea agreement, as Mr. Von Schuch asserted. There was no written rescission or termination of that agreement. If there had been, it would have most certainly been introduced into evidence instead of the Commonwealth's improper leading questioning on redirect examination of Cruse.

426. The Commonwealth's failure to provide counsel with a copy of the plea agreement and their failure to bring to the attention of court and counsel, the omission and misrepresentation of Cruse regarding the nature and extent of his meetings with the Commonwealth's Attorney prior to trial or further evidence of continued existence of the plea agreement with Cruse.

427. While counsel has sought to locate and interview Cruse, the Commonwealth has prevented such an interview, refusing to provide counsel with the location of Jeffery Cruse. Counsel has filed a motion for discovery requesting the production of Cruse as well as information leading to the history of his incarceration. Counsel would assert that an evidentiary hearing in which counsel could

examine Cruse would certainly lead to substantial evidence of a continuing plea agreement.

428. In the recent case of *Kyles v. Whitley,* 115 S.C. 1555 (1995), the United States Supreme Court emphasized the cumulative approach which a reviewing court should take in assessing the materiality of evidence and information required by *Brady v. Maryland,* 373 U.S. 83 (1963). The "touch stone of materiality" is whether the defendant received a fair trial resulting in a verdict worthy of confidence. 115 S.C. at 1566. Evidence becomes material when it becomes reasonably probable that its suppression will effect the result of the trial. A different verdict is reasonably probable when the states' suppression undermines the confidence in the outcome of the trial. *Bagley, supra.* at 678.

429. *Kyles,* requires prosecutors to disclosed both requested and unrequested favorable evidence "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different". 115 S.C. at 1565 (citing *Bagley, supra.* 682) The Supreme Court specifically rejected the suggestion that prosecutors should be held to some lesser standard because of the difficulty of such an evaluation. The court treated the prosecutor's discretionary power as a privilege, not a handicap. 115 S.C. at 1568.

430. Cruse was charged with capital murder before petitioner was. Why was Cruse tried last? There is only one answer to that question. The continued existence of the plea agreement was not only evidence which was suppressed, it provided the basis for the prosecutor's

cumulative approach to the production of favorable and exculpatory evidence.

431. This Court's duty to search for constitutional error is enhanced because the petitioner faces capital punishment. *Burger v. Kemp*, 483 U.S. 776 (1986).

432. The prejudice to the petitioner is clear. Given the prosecutorial misconduct in failing to provide favorable and exculpatory evidence, the Commonwealth violated petitioner's right as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

* * *

B. THERE IS EVIDENCE TO SUGGEST THAT THE PETITIONER WAS DEPRIVED A FAIR TRIAL AS A RESULT OF THE INTRODUCTION OF EXTRINSIC EVIDENCE.

443. After the capital trial had been completed and while petitioner's direct appeal was pending, trial counsel learned for the first time that one of the jurors, Blanton, was married to a state trooper who had arrested petitioner on several occasions. Trial counsel made a motion to remand the case for a hearing into possible juror misconduct and to hold the appeal in abeyance pending the outcome of the hearing. The Commonwealth opposed this motion, the motion was denied, and the conviction was affirmed on direct appeal. Petitioner again seeks remand to the Circuit Court for a hearing on possible Juror misconduct based on these same facts.

444. A fundamental requirement of a fair trial is that a jury's verdict must be based on evidence received in open court pursuant to the rules of evidence and subject to the test of cross-examination. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982), *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966). Extrinsic evidence, evidence that has not been subject to procedural protections, threatens such constitutional safeguards as the defendant's right of confrontation, of cross-examination, and of counsel. *Turner v. State of Louisiana*, 379 U.S. 466, 473 (1965). "The testing a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced. If they might have been prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trial awarded." *Thompson v. Commonwealth*, 247 S.E. 2d 707, 715 (Va.1951).

445. A hearing must be ordered to determine whether extrinsic evidence was improperly introduced into the deliberations at the guilt and sentencing phases of petitioners' trial, During voir dire, one of the prospective jurors stated that her husband was a state trooper and asserted that this would have no bearing on her decision in petitioner's case. (Voir dire at 174). She further stated that her husband did not discuss the details of his criminal investigations such as the subjects of his investigations. In response to the questions, she stated that she had known petitioner as a child, that she remembered his mother and had last seen her about three years ago. The juror stated that she did not recognize Williams at the time of trial as the little boy she had know [sic]. (*Id.*

at 181). The juror did not admit to any knowledge about petitioner's prior criminal record during voir dire.

446. However, the members of the jury were not immediately sequestered after jury selection was completed but were permitted to return home for the evening. (*Id.* at 299). Once the trial began the following day, the jurors were sequestered for the length of the trial. Thus juror Blanton had an opportunity to discuss the upcoming trial and to learn of petitioner's prior record from her husband. Given the husband's prior involvement with petitioner, it is highly probable that he made some observation on petitioner's past record when told that his wife had been selected for this highly publicized trial. As a law enforcement official, he would have been well-aware that petitioner had been charged not only with the murders of the Kellers but with four additional murders in a neighboring county. The receipt of any such outside information would mandate the juror's disqualification from the trial, and, if communicated to any other jurors, would have impermissibly tainted those jurors as well. Thus, a hearing is required to determine whether this juror received any extrinsic evidence about petitioner prior to rendering her verdict in this case. *See Robertson v. Metropolitan Washington Airport Authority*, 452 S.E. 2d 845, 847 (1995) ("[I]f [juror] misconduct is discovered after the jury is discharged and the allegations are sufficient to require investigation, a trial court abuses its discretion in ruling upon a motion for a mistrial without investigating the alleged misconduct to ascertain whether it prejudiced the case").

447. It is well-established that the introduction of extrinsic evidence is improper. *Brittle v. Commonwealth*,

281 S.E. 2d 889, 890 (Va. 1981). In *Harris v. Commonwealth*, 408 S.E. 2d 599 (Va. App. 1991), a juror injected his personal knowledge and experience concerning the operation of the parole system and the effect of parole on various sentences being considered by the jury. In *Evans-Smith v. Commonwealth*, 361 S.E. 2d 436, 445 (Va. App. 1987), a juror had consulted an almanac outside the jury room and then discussed his findings with the other jurors during deliberations. In *Thompson v. Commonwealth*, 70 S.E. 2d 284 (Va. 1952), a member of the jury panel had been a victim of the defendant, who had stolen his car, sometime before the trial. The prospective juror shared these facts with others on the panel before he was dismissed. The conviction was reversed on this basis for "the information was given to the jurors in an improper manner and no effort was made to ascertain what effect it had upon them." *Id.* at 290.

448. The error present in all these cases – the introduction of extrinsic material facts – may have occurred in petitioner's case based on information conveyed to juror Blanton. Petitioner's rights to confrontation, a fair trial, and due process as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as rights under the Virginia Constitution may have been compromised. Petitioner requests a hearing on this issue and an opportunity to conduct investigation and discovery prior to such hearing.

CONCLUSION

WHEREFORE, petitioner Michael Wayne Williams, prays that this Court grant him relief as follows.

1. Issue a Writ of Habeas Corpus commanding respondent to bring petitioner before the Court so that he may be released from his unconstitutional confinement and/or be relieved of his unconstitutional sentence of death.

2. Conduct a plenary hearing on this Petition and grant the right to present witnesses, exhibits and argument as appropriate.

3. Grant Petitioner the right to conduct discovery and subpoena witnesses *in forma* pauperis.

4. Grant Petitioner leave to amend this Petition as necessary to meet the needs of justice in light of any facts uncovered by the response of the Commonwealth hereto or of discovery or testimony.

5. Grant Petitioner the funds to retain experts in connection with this Petition and any proceedings related hereto.

6. Grant Petitioner a reasonable period of time after the completion of the plenary hearing in which to brief issues of law and fact that are raised herein.

7. Grant Petitioner such other relief as to which he may be entitled by law or which are required by the ends of justice.

MICHAEL WAYNE WILLIAMS

By /s/ Eric D. White
Eric D. White

[Certificate Of Service Omitted In Printing]

LIST OF ATTACHMENTS

EXHIBITS

Affidavit of Michael Wayne Williams

Affidavit of Robert Hart, Ph.D.

Affidavit of Donald C. Blessing, Esquire

Affidavit of R. Donald Ford, Jr., Esquire

Affidavit of Lucretia A. Carrico, Esquire

Notes of Counsel from Interviews with Michael Wayne Williams (2 pages)

Transcript of testimony from hearing of March 14, 1994, Commonwealth of Virginia v. Jeffrey Alan Cruse, Case No.: F-144

Transcript of testimony from hearing April 26, 1994, Commonwealth of Virginia v. Jeffrey Alan Cruse, Case No.: F-144

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

WARDEN, MECKLENBURG CORRECTIONAL CENTER,

Respondent.

AFFIDAVIT

Donald C. Blessing, Esquire, after being duly sworn, hereby deposes and states:

1. I am an attorney licensed to practice in the Commonwealth of Virginia.

2. I have represented two defendants charged with capital murder in Virginia prior to my representation of Jeffrey Allen Cruse.

3. I was appointed, along with Lee Randolph Harrison, to represent Jeffrey Allen Cruse on capital murder charges pending in Cumberland County in 1993.

4. Pursuant to my representation of Mr. Cruse, I became aware of an agreement between Mr. Cruse, his attorney at that time, James Baber and the Commonwealth's Attorney, Robert Woodson.

5. To the best of my knowledge, Mr. Cruse was never administered a polygraph examination.

6. The foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Donald C. Blessing
DONALD C. BLESSING,
ESQUIRE

STATE OF VIRGINIA
~~City~~/County of Prince Edward:

I hereby acknowledge that the foregoing was signed before me this 23rd day of January, 1996, by Donald C. Blessing, Esquire.

My Commission Expires: 10/31/98

/s/ Sharon G. Palmore
Notary Public

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

WARDEN, MECKLENBERG CORRECTIONAL CENTER,

Respondent.

AFFIDAVIT

R. Donald Ford, Jr., after being duly sworn, hereby deposes and states:

1. I am an attorney licensed to practice in the Commonwealth of Virginia.

2. I was appointed to represent Michael Wayne Williams, as lead counsel, on capital murder charges pending in Cumberland County, Virginia.

3. Prior to my appointment to represent Michael Wayne Williams, I had previous experience in representing defendants on capital murder charges in Virginia.

4. Prior to my appointment, Lucretia Carrico had been appointed to represent Michael Wayne Williams in Cumberland County.

5. I was also appointed to represent Michael Wayne Williams, as lead counsel, on capital murder charges pending in Prince Edward County, Virginia.

6. I was primarily responsible for handling the guilt/innocence phase of the trial in Cumberland County and Lucretia Carrico was primarily responsible for handling the sentencing phase of the trial in Cumberland County.

7. Despite our primary responsibilities we both discussed, and were familiar with, all issues and aspects of the case regarding guilt/innocence and sentencing.

8. I do not recall receiving from the Commonwealth a copy of the commonwealth's Exhibit No. 13, the written plea agreement dated March 2, 1993 between Jeffrey Allen Cruse, James Baber and the Commonwealth's Attorney, Robert Woodson. I was aware prior to trial of the substance of this agreement whereby Mr. Cruse would have been spared the death penalty and that the Commonwealth subsequently revoked the agreement because Mr. Cruse had not told the truth about the rape of the female victim.

9. Prior to the trial of Michael Wayne Williams, I was never advised by the Commonwealth that Mr. Cruse had not taken a polygraph examination.

10. I do recall being told that Mr. Cruse had cooperated with the Commonwealth by meeting with the Commonwealth's Attorney prior to testifying against Michael Wayne Williams on January 6, 1994.

The foregoing is true and correct to the best of my knowledge, information and belief.

/s/ R. Donald Ford, Jr.
R. Donald Ford, Jr.

STATE OF VIRGINIA
COUNTY OF CHESTERFIELD, to-wit:

I hereby acknowledge that the foregoing was signed before me this 26th day of January, 1996, by R. Donald Ford, Jr.

My Commission Expires June 30, 1999

/s/ Illegible
Notary Public

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

WARDEN, MECKLENBURG CORRECTIONAL CENTER,

Respondent.

AFFIDAVIT

Lucretia A. Carrico, Esquire, after being duly sworn, hereby deposes and states:

1. I am an attorney licensed to practice in the Commonwealth of Virginia.

2. In 1993, I was appointed to represent Michael Wayne Williams on capital murder charges pending in Cumberland County.

3. Prior to my representation of Michael Wayne Williams, I had never represented a defendant charged with murder or capital murder, although the Public Defender's Office had found my qualifications met the criteria to serve as co-counsel in capital murder cases.

4. Prior to my representation of Michael Wayne Williams, I had never received any training or education in the field of capital litigation. After my appointment to Michael Wayne Williams' case, however, I attended two capital litigation seminars prior to the trial of the matter and lead counsel and I worked closely with the Virginia Capital Case Clearinghouse at Washington and Lee University.

5. Subsequent to my appointment, Robert Donald Ford, Jr., Esquire, was appointed to serve as lead counsel in representation of Michael Wayne Williams.

6. I was also appointed to represent Michael Wayne Williams as co-counsel on capital murder charges pending in Prince Edward County, Virginia.

7. Mr. Ford was primarily responsible for handling the guilt/innocence phase of the trial in Cumberland County and I was primarily responsible for handling the sentencing phase of the trial in Cumberland County.

8. Despite our primary resonsibilities [sic] we both discussed, and were familiar with, all issues and aspects of the case regarding guilt/innocence and sentencing.

8. [sic] Included in my responsibilities were identifying, interviewing and preparing witnesses for the sentencing hearing. Mr. Ford was often present for interviews of these witnesses or reviewed summaries from the interviews.

9. It was also my responsibility to review materials received for use of possible exhibits during the penalty phase.

10. It was also my responsibility to work with Dr. Dewey Cornell who was appointed by the Court to assist the defendant for identification and presentation of mitigation at the penalty phase. Both Mr. Ford and I met with Dr. Cornell to discuss the sentencing phase of the trial and among other things, the presentation of mitigating evidence.

11. While Dr. Cornell discussed with Mr. Ford and me the difficulties experienced by Mr. Williams' mother

during her pregnancy, Dr. Cornell never suggested that a neuropsychiatric or a neuropsychological evaluation or examination may be appropriate given the pregnancy complications and given Dr. Cornell's diagnosis of Mr. Williams as suffering from Attention Deficit Hyperactivity Disorder.

12. At the time I was not familiar with the field of neuropsychiatry or its use in diagnosing organic brain damage or dysfunction, nor was I familiar with the application of neuropsychiatry in the field of mitigation and litigation.

13. If Dr. Cornell had suggested that a neuropsychiatric evaluation or examination was needed, I would have moved the Court for appointment of a neuropsychiatrist as an expert necessary to investigate the existence of another mitigating factor.

The foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Lucretia A. Carrico
LUCRETIA A. CARRICO

SUBSCRIBED AND SWORN TO before me this 25th day of January, 1996, by Lucretia A. Carrico, Esquire.

/s/ Illegible
Notary Public

My commission expires: 3/31/96

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[1] VIRGINIA:

IN THE CIRCUIT COURT OF THE
COUNTY OF CUMBERLAND

COMMONWEALTH OF VIRGINIA	
vs.	CASE NO. F-144
JEFFREY ALAN CRUSE	

Complete transcript of testimony and other incidents in the above, when heard on March 14, 1994, before the Honorable J. R. Snoddy, Judge.

CRANE-SNEAD & ASSOCIATES, INC.
4914 Fitzhugh Avenue
Richmond, Virginia 23230
Tel. No. (804) 355-4335

[2] APPEARANCES:

ROBERT G. WOODSON, JR.
Commonwealth's Attorney
for the County of Cumberland
Cumberland, Virginia 23040

WARREN VON SCHUCH
Assistant Commonwealth's Attorney
for the County of Chesterfield
Chesterfield, Virginia 23832

DONALD C. BLESSING
215 North Main Street
Farmville, Virginia 23901
Counsel for the Defendant, Jeffrey A. Cruse.

LEE R. HARRISON
P.O. Box 32
Cartersville, Virginia 23027
Counsel for the Defendant, Jeffrey A. Cruse.

* * *

[8] THE COURT:

* * *

Stand up, sir. State your full name.

THE DEFENDANT: Jeffrey Alan Cruse.

THE COURT: And when were you born, Mr. Cruse.

THE DEFENDANT: 12-22-67.

THE COURT: And I believe you understand there are certain charges against you that are set for hearing today?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Blessing and Mr. Harrison have been representing you since the beginning of this matter. With their [9] advice and counsel, are you ready for a hearing today?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Arraign the accused.

THE CLERK: Jeffrey Alan Cruse, you stand indicted for the following charges: Virginia, County of Cumberland, to wit: in the Circuit Court of the said

County, the grand jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said court for the said county upon their oaths present that Jeffrey Alan Cruse on or about the 27th day of February, in the year 1993, in the said County, and within the jurisdiction of the said court and within, one year prior to the finding of this indictment, did unlawfully and feloniously rob Morris C. Keller, Jr. of money, guns, VCR, television, microwave, various jewelry and other tangible personal property in violation of Section 18.2-58 of the Code of Virginia, 1950, as amended against the peace and dignity of the [10] Commonwealth of Virginia.

Are you guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: Virginia, County of Cumberland, to wit: in the circuit court of the said county, the grand jurors of the Commonwealth of Virginia in and for the body of the County of Cumberland, duly summoned to attend said court for the said county upon their oaths present that Jeffrey Alan Cruse on or about the 27th day of February in the year 1993, in the said county and within the jurisdiction of said court, and within one year prior to the finding of this indictment, did unlawfully and feloniously rape Mary Elizabeth Keller in violation of Section 18.2-61 of the Code of Virginia, 1950, as amended, against the peace and dignity of the Commonwealth of Virginia.

Are you guilty or not guilty?

THE DEFENDANT: Guilty.

MR. WOODSON: Your Honor, we have a motion to amend the next indictment that the Clerk is going to read. Would you like [11] to mark on there –

THE COURT: What is the next?

MR. WOODSON: The first degree murder, Your Honor, of Mr. Keller.

THE COURT: Come up and amend it.

MR. WOODSON: Your Honor, we are not changing the charge. It remains first degree murder. We are simply going to add the words, did as a principal in the second degree. The punishment remains the same up to a life sentence.

THE COURT: You all understand that the punishment is the same.

MR. BLESSING: Yes, Your Honor. We understand that as does Mr. Cruse, that he is still being charged with first degree murder, and we have all affixed our initials to the amendment, Mr. Harrison and myself, and Mr. Cruse.

THE COURT: All right. So.

THE CLERK: Virginia, County of Cumberland, to wit: in the circuit court of the said county, the grand jurors of the Commonwealth of Virginia in and for the body of the County of Cumberland, duly [12] summoned to attend said court for the said county, upon their oaths present that Jeffrey Alan Cruse on or about the 27th day of February, in the year 1993, in the said county and within the jurisdiction of said court, and within one year prior to the finding of this indictment, did as a principal

in the second degree feloniously kill and murder Morris C. Keller, Jr., in violation of Section 18.2-32, of the Code of Virginia, 1950, as amended, against the peace and dignity of the Commonwealth of Virginia. Are you guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: Virginia, County of Cumberland, to wit: in the circuit court of the said county the grand jurors of the Commonwealth of Virginia, in and for the body of the County of Cumberland, duly summoned to attend said court for the said county, upon their oaths present that Jeffrey Alan Cruse, on or about the 27th day of February, in the year 1993, in the said county and within the jurisdiction of [13] said court, and within one year prior to the finding of this indictment, did willfully, deliberately and with premeditation, feloniously kill and murder Mary Elizabeth Keller, subsequent to raping Mary Elizabeth Keller, in violation of Section 18.2-31(5) of the Code of Virginia, 1950, as amended, against the peace and dignity of the Commonwealth of Virginia. Are you guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: Virginia, County of Cumberland, to wit: in the circuit court of the said county, the grand jurors Commonwealth of Virginia in and for the body of the County of Cumberland, duly summoned to attend said court for the said county, upon their oaths present that Jeffrey Alan Cruse, on or about the 27th day of February, in the year 1993, in the said county and within the jurisdiction of the said court, and within one year prior to the finding of this indictment, did unlawfully,

feloniously and maliciously in the nighttime burn the dwelling house of [14] Morris C. Keller, Jr., in which Morris C. Keller, Jr., and his wife, Mary Elizabeth Keller, usually dwelled, in violation of Section 18.2-77 of the Code of Virginia, 1950, as amended against the peace and dignity of the Commonwealth of Virginia.

Are you guilty or not guilty?

THE DEFENDANT: Guilty.

MR. WOODSON: Your Honor, we would move to nol pros all the remaining charges, based on the pleas to these five charges.

THE COURT: I take it you all have no objection to that?

MR. BLESSING: No, sir, Your Honor.

MR. HARRISON: No, sir, Your Honor.

THE COURT: The Court allows it. Nol pros on the remainder of the charges.

MR. WOODSON: Your Honor, if I might. I understand before you can accept the guilty pleas, you must ask certain questions.

THE COURT: I understand.

[15] MR. WOODSON: As it is your manner, custom and often desire, I have prepared those questions in writing so you may file them with the record, although we understand that you will still ask them personally of Mr. Cruse. May I tendered those?

THE COURT: Yes, please. Now you recall going over certain questions here with your attorneys?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And you answered these questions. Are they the truth, so help you God?

THE DEFENDANT: Yes, sir.

THE COURT: They will be filed along with the record in this case. Now before I can accept your pleas of guilty on these charges, there are certain questions I have to ask you, similar to the ones that you have answered, but first, what is your full name?

THE DEFENDANT: Jeffrey Alan Cruse.

[16] THE COURT: Secondly, what is your date of birth?

THE DEFENDANT: 12-22-67.

THE COURT: What was the last grade in school that you completed?

THE DEFENDANT: Eighth grade.

THE COURT: What other education have you received since then?

THE DEFENDANT: None.

THE COURT: Are you the person charged in the indictments that have just been read?

THE DEFENDANT: Yes, sir.

THE COURT: Do you fully understand the charges against you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed these charges and their elements with your lawyers, and you understand what the Commonwealth must prove before you can be found guilty on these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had enough time to discuss with your lawyers any possible defenses which you may have in [17] these charges?

THE DEFENDANT: Yes, Sir.

THE COURT: After this discussion, did you decide for yourself that you should plead guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Are you entering a plea of guilty because you are, in fact, guilty of the crimes charged?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have, do you understand that by pleading guilty, you are not entitled to a trial by jury?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that by pleading guilty you may waive your right not to incriminate yourself?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that by pleading guilty you waive your right to confront and cross-examine your accusers?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand – Let's see. You are not on parole or [18] anything at the present time, are you?

THE DEFENDANT: No, sir.

THE COURT: Has anyone connected with your arrest and prosecution, such as the police or the Commonwealth's Attorney or any other person, in any manner threatened you or forced you to enter the plea of guilty?

THE DEFENDANT: No, sir.

THE COURT: Have you received any promises concerning your plea of guilty?

THE DEFENDANT: No, sir.

THE COURT: Do you understand that the maximum punishment for these crimes is as to the capital murder charge on Mrs. Keller carries the death penalty?

THE DEFENDANT: Yes, sir.

THE COURT: And that the other charges against you all carry life imprisonment, up to life imprisonment.

THE DEFENDANT: Yes, sir.

THE COURT: I mean up to that on all of these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Now, are you entirely [19] satisfied with the services of your, of Mr. Blessing and Mr. Harrison as your attorneys.

THE DEFENDANT: Yes, sir, I am.

THE COURT: You understand that by pleading guilty, you may waive any right to appeal the decision of this court?

THE DEFENDANT: Sure am.

THE COURT: Have you entered – And we have already gone over the guilty plea form. You have read that and the answers are true?

THE DEFENDANT: Yes, sir.

THE COURT: Have you entered into any plea agreement with the Commonwealth?

THE DEFENDANT: No, sir.

THE COURT: Do you understand all of the questions that I have asked?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions to ask the Court?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: Do you have anything to say?

[20] THE DEFENDANT: No, sir.

THE COURT: The Court finds that your pleas of guilty were made freely, intelligently and voluntarily with an understanding of the nature of the charges and

the consequences of the pleas and accepts your pleas at this time.

You may be seated.

MR. VON SCHUCH: Judge, this Court sat in and heard the trial and the evidence in the trial of the codefendant, Mr. Michael Wayne Williams. During that trial this defendant, Mr. Jeffrey Cruse, testified if the Court will recall. We would ask the Court to incorporate by reference not only the defendant's testimony in that case, but the evidence in that case in considering the substantial elements, or the significant elements of these offenses.

In addition to that, Judge, all parties have entered into a stipulation which we would, have signed and would give to the Court. I will read it to the Court at this time. The stipulation would be, [21] the defendant, the attorneys for the defendant, and the attorneys for the Commonwealth, would stipulate that the defendant within the County of Cumberland on the 27th day of February, 1993, did commit the following offenses: number one, willfully, deliberately and with premeditation feloniously kill and murder Mary Elizabeth Keller subsequent to raping Mary Elizabeth Keller, in violation of Section 18.2-31(5) of the Code of Virginia, 1950, as amended; number two, that the defendant did feloniously kill and murder Morris C. Keller, Jr., in violation of Section 18.2-32 of the Code of Virginia, 1950, as amended, as a principal in the second degree; number three, unlawfully and feloniously rape Mary Elizabeth Keller in violation of Section 18.2-61 of the Code of Virginia, 1950, as amended; number four, unlawfully, feloniously and

maliciously in the nighttime burn the dwelling house of Morris C. Keller, Jr., in which Morris C. Keller, Jr., and his wife, Mary Elizabeth Keller, usually dwelled, in violation of [22] Section 18.2-77 of the Code of Virginia, 1950, as amended; and finally, number five, unlawfully and feloniously rob Morris C. Keller, Jr. of money, guns, VCR, television, microwave, various jewelry and other tangible personal property in violation of Section 18.2-58 of the Code of Virginia, 1950, as amended.

Judge, this stipulation has been signed by all the attorneys and the defendant, Mr. Cruse, in this case. We would offer that as Commonwealth's Exhibit No. 1 in the case of Jeffrey Cruse and ask the Court to accept also the stipulation on the incorporation by reference of the evidence in the Michael Williams case.

THE COURT: Do you all agree that that would be the evidence that the Commonwealth placed upon the record and the Court?

MR. BLESSING: Yes, Your Honor.

We agree with the stipulation.

THE COURT: Do you agree?

THE DEFENDANT: Yes, sir.

THE COURT: Do you agree?

[23] MR. HARRISON: Yes, sir, Your Honor.

THE COURT: So stipulated.

NOTE: The above-referred-to documents were marked and filed as Commonwealth Exhibit No. 1.

MR. VON SCHUCH: That would be the Commonwealth's evidence in chief.

THE COURT: Do you all have any evidence or anything?

MR. BLESSING: No, sir.

MR. HARRISON: No, sir, Your Honor.

MR. BLESSING: But we would like to make a motion after you pronounce sentence.

THE COURT: All right. Do you have anything to say before the Court pronounces judgment?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: Based upon your pleas of guilty, upon the stipulation of facts as [24] agreed to by you, your attorneys and the Commonwealth's Attorneys, I find as a matter of fact and a matter of law that you are guilty as charged in that you did on or about the 27th day of February, 1993, in Cumberland County, willfully, deliberately and with premeditation feloniously kill and murder Mary Elizabeth Keller subsequent to raping Mary Elizabeth Keller in violation of Section 18.2-31(5) of the 1950 Code of Virginia as amended.

I find as a matter of fact and as a matter of law that you are guilty as charged in that you did on or about February the 27, 1993, in Cumberland County, unlawfully did, as a principal in the second degree, unlawfully, feloniously kill and murder Morris C, Keller, Jr., in violation of Section 18.2-32 of the 1950 Code of Virginia as amended.

I find as a matter of fact and as a matter of law that you are guilty as charged in that you did on or about February the 27th, 1993, in Cumberland County, unlawfully, feloniously rape Mary [25] Elizabeth Keller in violation of Section 18.2-61 of the 1950 Code of Virginia as amended.

I find as a matter of fact and as a matter of law that you are guilty as charged in that you did on or about February the 27th, 1993, in Cumberland County unlawfully, feloniously and maliciously in the nighttime, burn the dwelling house of Morris C. Keller, Jr., in which Morris C. Keller, Jr. and his wife Mary Elizabeth Keller, usually dwelled, in violation of Section 18.2-77 of the 1950 Code of Virginia, as amended.

I find as a matter of fact and as a matter of law that you are guilty as charged in that you did on or about February the 27th, 1993, in Cumberland County, unlawfully and feloniously rob Morris C. Keller, Jr., of money, guns, VCR, television, microwave, various jewelry and other tangible personal property, in violation of Section 18.2-58 of the 1950 Code of Virginia as amended.

You maybe seated.

* * *

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[1] VIRGINIA:

IN THE CIRCUIT COURT OF THE
COUNTY OF CUMBERLAND

COMMONWEALTH OF VIRGINIA	
vs.	CASE NO. F-144
JEFFREY ALAN CRUSE	

Complete transcript of testimony and other incidents in the above, when heard on April 26, 1994, before the Honorable J. R. Snoddy, Judge.

[3] NOTE: The case is called to be heard as follows:

THE COURT: Good afternoon.

MR. WOODSON: Good afternoon, Judge.

MR. BLESSING: Good afternoon.

MR. HARRISON: Good afternoon, Judge.

MR. VON SCHUCH: Good afternoon, Your Honor.

THE COURT: I believe the matter for this afternoon is a sentencing of Jeffrey Alan Cruse, him having already been tried and a presentence report requested.

Stand up. State your full name, please.

THE DEFENDANT: Jeffrey Alan Cruse.

THE COURT: And when were you born?

THE DEFENDANT: December 22, 1967.

THE COURT: And do you understand [4] what we are here for today, and I take it you all have seen the presentence report as requested?

MR. BLESSING: Yes, sir, Your Honor, we have gone over that.

THE COURT: Have you gone over it with your client?

MR. BLESSING: Yes, sir, we have.

THE COURT: And you all have received your copies, Mr. Woodson?

MR. WOODSON: Yes, sir, Your Honor.

THE COURT: The Court has received it and is well aware of all of the contents. Go ahead and get a first day waiver, anyway. You may be seated.

All right. Gentlemen.

MR. VON SCHUCH: Judge, the Commonwealth has no witnesses at sentencing at this time. We are prepared to make a closing argument.

MR. BLESSING: Your Honor, if I might just to make certain that everything is properly before the Court. We have agreed with the Commonwealth to stipulate [5] the presentence report. We have agreed to stipulate the supplement to the presentence, report, which is the psychological information that was late getting to the probation officer. The probation officer told us that there would be a delay in coming and supplemented that in the letter.

THE COURT: Well, I don't think I have received that, the psychological.

MR. BLESSING: I certainly have a copy of it that I might tender to the Court. Do you have that?

THE COURT: Let's take a five minute –

MR. BLESSING: Your Honor, additionally, before we do that?

THE COURT: Go ahead and do it.

MR. BLESSING: We had asked the Commonwealth, and I am under the impression that the Commonwealth would also stipulate to this letter from James Innis, who is the Commonwealth's Attorney in Prince Edward County relating to some activities and cooperation that Mr. Cruse provided to Prince Edward County.

[6] MR. VON SCHUCH: We would stipulate to those facts.

THE COURT: You might have mailed it to Buckingham. I have been everywhere but there for the last week and a half.

You have no evidence that you want to put on at this time?

MR. BLESSING: No, Your Honor.

MR. VON SCHUCH: Judge, may it please the Court. We are here today to sentence Mr. Cruse for the involvement that he had in the rape, double homicide of the Kellers here in Cumberland County.

Judge, as the Court well knows, Mr. Williams, his codefendant was tried with a jury and received a death

sentence for his involvement in these crimes, and I am here to make a recommendation based on certain things that I see in this case to the Court at this time.

I think that I pointed out to the jury when we tried Michael Williams that I had initially noticed some distinction between Mr. Cruse and Mr. Williams, both personally, and in their conduct at the [7] crime, and as individuals. First of all, I think Mr. Cruse is aware, and I think the Court is aware, that he did cooperate with the Commonwealth. In fact, one of the differences between Mr. Cruse and Mr. Williams is that Mr. Cruse, when he was apprehended not only made a complete confession of everything but the rape to the police officers involved, but he also took the police to the Rappahannock River within days of his arrest. As a result of that, we recovered the .357 magnum which was used to kill the four people in Prince Edward County. We would never have had that and that case never would have been cleared if Jeffrey Cruse had not, on his own, taken us to the river and pointed that weapon out and enabled us to recover it.

He also testified against Michael Williams in the case in chief, giving us the elements that we needed to prove capital murder. And he also cooperated with and testified for Mr. Anderson in Farmville in the murder of the four people in Prince Edward County.

[8] He has cooperated with the Commonwealth, and he has done so from the beginning, and that is certainly substantially different than Mr. Williams and Mr. Williams's attitude towards the Commonwealth and his flight to Georgia when he realized that he was about to be arrest [sic]. Judge, beyond that I noted that Mr. Cruse has

virtually limited, no prior criminal record. I think we have an unauthorized use, which may have been a misdemeanor, and he has some traffic record, but there is no history, no record of prior violent conduct in his background, certainly nothing of this sort.

The Court will recall before Michael Williams came into Cumberland County and murdered the Kellers and murdered four people in Prince Edward County, there is a vast distinction in the background of these two individuals. And I would represent to the Court based upon what I know, that Jeffrey Cruse, and I don't think anyone in the world knows this better than Jeffrey Cruse, that if he had [9] never met Michael Williams, he wouldn't be here today, and I think it is that simple.

Judge, I have also noticed the differences between Mr. Cruse and Mr. Williams in one other area, and that is that I don't think I have ever dealt with anyone in all the years I have been prosecuting who has legitimately, as far as I can tell, has been bothered by what he did. I noted that as we talked to him, he had a very difficult time talking about it. And I think I had him describe to the jury during the Williams case one instant where I took the pictures out to try and get him to identify certain locations for me as to what happened at what point in time. And he literally broke down in front of all of us for approximately 15 minutes and was totally out of it in tears and hysterical crying.

He has complained from the beginning, and I think probably the one thing that stood out in my mind when I showed him the pictures, he said, I don't need to look at that. He said I see that [10] every night when I go to bed.

I believe that he probably will for some time to come for the rest of his life.

I think that we also are dealing with, a young man who has, because of the depression, not only over his future, but over what he has done, has legitimately attempted a suicide, which he nearly succeeded at, and I think that is indicative of the fact that he has some feelings and some conscious and some real depression and some recognition of what he did was wrong, which is a starting place, which we don't have with Michael Williams. I believe that he is suffering as much, and probably at this point, more than Michael Williams who has already been sentenced to death and has that to look forward to in his life.

Judge, I would point out to the Court that because of his background, because of his involvement which was slightly less than Michael Williams, although he is certainly equally culpable, and because of those things that we and [11] Mr. Woodson have noted about him, because of his cooperation with the Commonwealth, we would recommend to the Court that this Court not sentence Mr. Cruse to death at this time. We would make the recommendation that based upon his presentence and those other things I have pointed out, that he would be an appropriate candidate for a life sentence on the charge of capital murder, a life sentence on the charge of the murder of Mr. Keller, and a, on the other three charges, he should receive the same sentence as Mr. Williams, which I believe was life on rape, 40 years on the robbery, and 50 years on arson. And those would be the recommendations that the Commonwealth would make to the Court. I

pointed out the reasons why we would strongly urge the Court to follow the Commonwealth's recommendation.

MR. BLESSING: Your Honor, if I might. As you can well expect, we are joining in and asking the Court to accept the recommendations of the Commonwealth. I [12] point out to you, as I think you are aware, Mr. Cruse has not tried to avoid responsibility. He has owned up to his responsibility in that regard.

What I want to talk to you about is the capital murder charge. We have no qualms, we have no problem, we have no disagreement with the recommendation on the other the charges. It is Mr. Cruse's life which we are concerned about here at this juncture. Much of what I say may reiterate the Commonwealth's statements, but I feel compelled to make them. The factors which support the Court's consideration, and hopefully an award of a life sentence for Mr. Cruse, included his early admission of guilt, in this matter. He was honest and forth coming with everything, with the exception of the rape, and then later he fessed up to that.

He was cooperative. He was cooperative without any promise of anything in exchange for his testimony. He testified twice on that chair in Cumberland County. Once was at the preliminary [13] hearing and the other was before you, Your Honor, in the jury trial. You didn't have the occasion to view him at the preliminary hearing; you did at the trial; and I think it was quite obvious of his emotion and remorse.

Nonetheless, he got through what he had to do to cooperate with the Commonwealth and establish the elements that were necessary to convict Michael Williams of

the offenses that he was convicted of. And ultimately, I would tend to think, it is up to the Court to judge having heard the evidence, that his testimony was substantial in providing some of the evidence, the wherewithal to provide the death sentence for Mr. Williams.

In Prince Edward County, although he was not aware of those offenses, had no participation, didn't know anything about them until some time after the Cumberland offenses, he came forward and cooperated with the Commonwealth's Attorney in Prince Edward County, and you have his letter before you that indicates that he was [14] cooperative, which resulted in the guilty pleas in the four Prince Edward slayings involving Mr. Williams.

THE COURT: I heard those cases, as you know.

MR. BLESSING: It is also important, as the Commonwealth has pointed out to you, that Mr. Cruse cooperated not just to the extent of giving his statement and appearing and giving testimony, but he actually helped to locate the physical evidence which was used in both cases. He went to the scene. I think there was even an instance where one of the divers was having problems locating something. He directed them over to another area, and within moments they found what they were looking for.

Another factor is the type of person that this individual is. Certainly these are terrible actions. We have never stood before you and said that these are something that could be overlooked by the Court. As I said, he has accepted his responsibility, but he has been remorseful [15] in a manifest way. Every time that I have had the opportunity to see him, every time that Mr. Harrison,

every time that the Commonwealth, the officers that work for the Commonwealth, there has always been a point in every conversation where he has either broke down and cried, or has had to take a break, and be to himself. He cried in front of you at the Williams' trial. He has been riddled with guilt for his wrongful actions, which is evidenced not only by his suicide but by the depression that is mentioned, or his attempted suicide, and the depression that is mentioned in the mental health report.

I has also expressed to your probation officer on page 9 of the report, and I quote, I wish I could bring them back, talking about the Kellers. I would do anything if I could make them feel better; I would do anything for their forgiveness.

I suggest that the presentence report and the other items stipulated support a life sentence for Mr. Cruse. [16] They show his cooperativeness. Your Honor, you often read presentence reports. The official version in this report is the same as Mr. Cruse's version. You know, there is always somebody trying to tell you something different. Well, there wasn't any problem getting his version, because it was on the transcript. It was there and you can see it.

His jail adjustment has been relatively good, particularly in Powhatan. Although he prefers to be in segregation, because he is having a hard time handling himself, his guilt, and his depression.

He does not have anything significant in his record. There is no prior offenses like this in his record, whatsoever. The presentence and the psychological reports do

show character flaws, one of which is that he is easily influenced by others. The Commonwealth stated to you had he never met Michael Williams, this would not have happened. I believe that to be so, and I believe there are statements indicative of that in this [17] presentence report.

The psychiatric report goes on to point out that he is significantly depressed. He suffered from post traumatic stress. His symptoms include nightmares, sleeplessness, sobbing, reddening of the face, severe depression, flash backs, nightmares, in particular exactly what Mr. Von Schuch said. Seeing the pictures, he says he sees the pictures coming at him time and time again.

I think the history of this suicide attempt bears out his remorse. He is described as a young man searching for the – in his life, an insatiable need to be accepted and loved.

He was filled with fear of Michael Williams. He did participate and he is culpable, but if you remember, he didn't think anything was going to happen. Williams pointed a gun at him and said you pull your trigger, too.

Again the psychological report states he is overwhelmed by feelings of guilt and shame in his actions. He is [18] numb. He is trying to suppress his feelings, but when he has feelings, there is only pain and sadness. It also says, I believe, that he was the father, expressed my opinion. Born out by other things. He said that if he were in control that night, no one would have been killed. Almost parallels a statement that if he never met Williams, no one would have been killed.

I don't think that there is anything in his record that suggests future dangerousness element, which would be an element that would be considered in awarding the death sentence.

Certainly, Your Honor, in my attempt to try to research the cases that are before the Virginia Supreme Court, I have not been able to find a case where a man with the profile that I have described for Mr. Williams [sic] has been sentenced to death. I tried to do an exhaustive search, and I can't find anything. I may have overlooked something. I think if you contrast him with Mr. Williams, you see two remarkably different persons. A remorseful [19] and cooperative individual sits here. The one who sits on death row is a cold, callous, vicious, vile person who took not just two lives here, but four lives in Prince Edward with a remarkably different prior criminal record.

Your Honor, I certainly feel that Mr. Cruse has, of course, his life ahead of him. Certainly he probably definitely cannot compare to what the Kellers and their relatives experienced and are experiencing. One of two fates await Mr. Cruse' sentence to a life imprisonment. He may well go into the penal institution, as you are probably aware, Your Honor, and he will be known as a snitch. Somebody who testified against somebody. He will always be looking over his shoulder. Or, the other, he may suffer both if it were a life sentence, and that is he suffers from his anguish, his guilt, his depression, continually seeing those pictures that he didn't want Mr. Von Schuch to show him, continually seeing the victims coming at him at night.

[20] Your Honor, Mr. Harrison and I have attempted to represent Mr. Cruse to the best of our abilities. To restate, the only issue I am addressing is not the punishment recommended on the other charges, the robbery, but it's whether death or life should be imposed. In the capital murder charge, You Honor, we would ask that you impose a life sentence. Thank you.

MR. VON SCHUCH: The only thing I wanted to add was that Mr. Woodson and I have met with the families of Morris and Mary Keller about Mr. Cruse on a couple of occasions, and certainly they want him punished to the fullest extent of the law. You can imagine how they, the grief that they have had to bear the last year. But we have talked to them, and they themselves suggested that having seen the trial of Michael Williams, they understand there is a difference between Mr. Cruse and Mr. Williams, and they have no objection, voiced no objection when we suggested that we would make this recommendation because [21] they said they understood those things that went into what we were doing. I wanted the Court to be aware that we had talked with the families of the victims before today about this matter.

THE COURT: Of course, this is always a real burden, nothing like the burden that the families are receiving; because this man has a burden, but he brought that on himself. I can see a difference, there is no question about that, between the two men, having dealt with them over a long period of time now. And I understand what these gentlemen mean when they say that they would not have had, and you would have had a hard time convicting certainly of all of the charges that Mr. Williams was convicted without his testimony. I don't know where you

would have been. But without his testimony, there certainly would not have solved the four murders in Prince Edward. They would not have had the evidence to convict there. I think that's clear.

One of the main things I am [22] taking into consideration is the recommendation of the Commonwealth. Mr. Von Schuch, I guess, has more people on death row than any other prosecutor around, or has had, and it isn't often that he recommends sparing a life. And I don't know that this is sparing a life, because – the punishment that I am going to give. We don't know what the situation will be in the future.

Stand up. Do you have anything to say before the Court decides the punishment that you will receive?

THE DEFENDANT: I would like to tell you and the family of the Kellers that I am sorry that my actions caused so much sorrow, and I know nothing I can say or do will bring them back. And I hope what I have done to assist the Commonwealth brings a measure of relief to the families of Mr. and Mrs. Keller.

THE COURT: I am going to follow the recommendation of the Commonwealth, and I am glad that you talked with the families because I am not sure I would have done [23] this without that.

On the capital murder of Mary Elizabeth Keller subsequent to raping her, I sentence you to life in the Virginia Corrections system.

On the charge of first degree murder of Morris C. Keller, Jr., as a principal in the second degree, I sentence you to life imprisonment.

All of these run consecutively, of course.

On the charge of rape of Mary Elizabeth Keller, I sentence you to life imprisonment.

On the charge of arson of the Keller dwelling, I sentence you to 50 years.

On the sentence of the robbery of Morris C. Keller, Jr., I sentence you to 40 years.

I am sure you won't be released during the lifetime of most of us. That's all.

MR. WOODSON: Thank you, Your Honor.

[24] MR. BLESSING: Thank you, Your Honor.

MR. VON SCHUCH: Thank you.

MR. HARRISON: Thank you, Your Honor.

END OF PROCEEDINGS

Supreme Court, U.S.
FILED
DEC 16 1999
CLERK

No. 99-6615

In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

vs.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON, WAVERLY VIRGINIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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BARBARA L. HARTUNG*
1001 E. Main Street
Suite 504
Richmond, Virginia 23219
Telephone: (804) 649-1088

JAMES E. MOORE
CHRISTIAN & BARTON, L.L.P.
909 E. Main Street
Suite 1200
Richmond, Virginia 23219
Telephone: (804) 697-4100

Counsel for Petitioner

**Counsel of Record*

MARK L. EARLEY
Attorney General
DONALD R. CURRY*
Senior Assistant
Attorney General

Office of the Attorney
General of Virginia
900 E. Main Street
Richmond, Virginia 23219
Telephone: (804) 786-4856

Counsel for Respondent

Petition For Certiorari Filed October 18, 1999
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IN THE SUPREME COURT OF VIRGINIA

[Caption Omitted In Printing]

AFFIDAVIT

1. We are R. Donald Ford and Lucretia A. Carrico. We represented Michael Wayne Williams at his 1994 jury trial in the Circuit Court of Cumberland County for capital murder and numerous other related felonies. (Except where otherwise indicated, either expressly or by the context, further references to the terms "we," "us" and "our" should be construed to refer to the defense team as a whole and not necessarily to both defense attorneys individually).

2. One of us (Ford) has been practicing law for 16 years and the other (Carrico) for 18 years. At the time we were appointed to represent Williams, we both had extensive experience trying felony jury cases. One of us (Ford) had handled five capital cases prior to Williams', including one case that has been litigated all the way through a capital jury sentencing proceeding. While one of us (Ford) was primarily responsible for the guilt stage of Williams' case and the other (Carrico) was primarily responsible for the penalty stage, we consulted with each other throughout the case and jointly made all major decisions about the way the case was presented and tried. We worked very closely and very well together during the investigation and trial of Williams' case.

3. We conservatively estimate that together we spent a total of approximately 500 hours preparing for and trying Williams' case.

Jury Selection

4. We thoroughly prepared ourselves for jury selection. We spent a great deal of time preparing our own proposed voir dire questions and reviewing those proposed by the prosecution. In preparing for voir dire, we sought and obtained assistance from the Virginia Capital Case Clearinghouse (VCCC) at Washington and Lee.

5. With respect to the actual voir dire that was conducted, all of the questions that we asked or chose not to ask, and the jurors to whom such questions were or were not posed, were determined as a matter of trial strategy based upon what we thought at the time was in Michael Williams' best interest. During the voir dire process, we paid close attention not only to what the jurors said, but how they looked and sounded when they gave their answers. This information played an important part, not only in the way we conducted voir dire, but also in the decisions we made about which jurors to challenge for cause and which jurors to strike peremptorily.

6. With respect to Juror Judith Bernard, we decided not to object to the prosecution's challenge for cause because we were of the opinion that, on balance, the juror's answers indicated she would be a pro-prosecution juror. We were particularly concerned about the fact that the juror said she already had made up her mind based upon what she had read about the case and that she wanted "to see justice done."

Jeffrey Cruse

7. We thoroughly prepared for the testimony of Williams' co-defendant, Jeffrey Cruse: the Commonwealth gave us complete discovery of the investigative file, including the summary of the investigation prepared for the prosecution by the State Police; we interviewed the primary State Police investigator; we had Cruse's complete criminal record; we reviewed all of Cruse's statements to the police, as well as his testimony at Williams' preliminary hearings in Cumberland County and Prince Edward County where we had the opportunity to observe and cross-examine Cruse. We even obtained from the VCCC a written analysis of all possible inconsistencies in Cruse's various statements.

8. We also knew that prior to Williams' trial Cruse has been interviewed by a newspaper reporter. We had the published account of that interview as an additional source of information regarding Cruse's expected testimony. Although we did not interview Cruse prior to Williams' trial, we did discuss Cruse's expected testimony with the two lawyers who were representing Cruse. Both of these attorneys were present in Cumberland Circuit Court when Cruse testified against Williams.

9. We were aware prior to trial that Cruse previously had had an agreement with the Cumberland Commonwealth's Attorney whereby he would have been spared a possible death sentence and we were aware that the Commonwealth subsequently had revoked the agreement because Cruse had not been completely truthful.

10. Our basic strategy regarding the cross-examination of Cruse was to point him as a person who repeatedly had lied to the police and who, although he said he no longer had a plea agreement, was testifying the way he thought the prosecution wanted him to testify about Williams' role in the offenses in order to save his own life. We elicited from Cruse that he was a willing participant in the robbery, the ransacking and burning of the Kellers' house and the rape of Mrs. Keller. We pointed out the fact that Cruse's testimony conveniently had the two firearms involved changing hands between him and Williams at the points necessary to make Williams appear more culpable. We also impeached Cruse with a prior inconsistent statement from the preliminary hearing where he had falsely denied having a prior conviction for an offense involving lying, cheating or stealing. We wanted to impeach Cruse additionally with a prior misdemeanor assault conviction, but the trial judge ruled we could not do so.

11. In sum, we were as prepared to confront and cross-examine Cruse as well as we possibly could have been. None of his testimony was a surprise and, except for not being able to use his assault and battery as impeachment, we accomplished substantially what we set out to do.

Prosecutors' Arguments

12. As a matter of general strategy, we believe it is better not to object to a prosecutor's remarks or arguments to the jury unless absolutely necessary. Such objections run the risk of emphasizing adverse matters before

the jury or giving the jury the impression the defense is trying to cover something up. In Michael Williams' case, we refrained from making such objections because, in our opinion, any such objections would have been overruled by the trial judge and the objections could have adversely affected our client in the jury's eyes.

Voluntary Intoxication

13. Prior to trial, we thoroughly interviewed Michael Williams with respect to the murders in Cumberland County, as well as the four homicides in Prince Edward County with which he also was charged. On all occasions, he gave us a consistent, coherent account of what he said had occurred. Although he told us that on both occasions he had been drinking alcohol and using drugs, he never said or suggested that he could not remember what had happened. To the contrary, he remembered both events in great detail. All of his accounts, moreover, demonstrated to us that at the time of the events he was capable of rational thinking and planning, as well as the ability to carry out those plans.

14. We spent numerous hours researching Virginia law on the issue of voluntary intoxication as a defense to premeditated murder. Based upon this research, as well as what Michael Williams told us had occurred with respect to the Cumberland County crimes, we concluded that there was no evidence that would have supported a defense that he was so intoxicated on alcohol and/or drugs that he was unable to premeditate.

15. Michael Williams' testimony at the guilt stage of trial was consistent with what he had told us prior to

trial. A review of his detailed testimony clearly demonstrates why voluntary intoxication was not a viable defense.

16. At the penalty stage, Michael Williams' long history of alcohol and drug abuse was presented to the jury as a mitigating circumstance through the testimony of our appointed expert, Dr. Dewey Cornell. It was our strategy not to assert Michael's intoxication at the time of the crimes as an excuse for his actions, but rather as part of a continuing symptom of his overall disorder. We could not assert, however, that Michael Williams was so intoxicated that he was incapable of premeditation regarding the Prince Edward homicides, or even that he was not fully aware of what he was doing. To the contrary, based upon what he had told both us and Dr. Cornell, he deliberately shot George Atkinson, Sr. to prevent him from calling the police, he deliberately shot George Atkinson, Jr. after taking a significant period of time to decide whether to kill him, and he deliberately set the Atkinson house on fire to destroy the evidence of what he had done.

Dr. Massello

17. We were thoroughly prepared for Dr. Massello's testimony at the penalty stage regarding the autopsies of the four Prince Edward County victims. We had reviewed all of the autopsy reports and Dr. Massello's testimony was consistent with those reports. We decided, as a matter of trial strategy, not to cross-examine Dr. Massello. Our strategy was to get Dr. Massello off the witness stand as quickly as possible. We did not want to ask him any

questions which might result either in his using the photographs of the victims to illustrate his response or in the prosecution's using the photographs again on redirect. The photographs were very damaging to the defense and we simply did not want to run the risk of making a bad situation worse.

Johnny Williams

18. We chose, as a matter of strategy, not to cross-examine Johnny Williams because his testimony regarding what the defendant had told him about the Prince Edward homicides was a more favorable version of the event than what the defendant has told us. Johnny was a reluctant prosecution witness and it was our impression that the prosecution had not succeeded on direct examination in eliciting from him all the information it had hoped to elicit. We had thoroughly interviewed Johnny prior to trial, and we did not want to risk inadvertently eliciting such adverse information on cross-examination or giving the prosecution another chance to do so on redirect.

Williams' Mother and Grandfather

19. We called Michael Williams' mother and grandfather as witnesses at the penalty stage because we concluded that their value as mitigation witnesses outweighed any damage that would be done on cross-examination regarding the fact that after the Keller murders they took Michael out of Virginia to Florida and

Georgia. We did not object when the prosecution questioned them on this point because such an objection certainly would have been overruled on the grounds that the Commonwealth was entitled to cross-examine the witnesses on the issue of bias.

Mental Evaluation

20. Prior to trial, we requested the assistance of a mental health expert and submitted to the trial judge the names of three such experts of our choosing. One of those experts we chose was Dr. Dewey Cornell, a clinical psychologist who had been highly recommended to us by a member of the Richmond criminal defense bar. The trial judge appointed Dr. Cornell to assist us.

21. We provided Dr. Cornell with all of the relevant information regarding the crimes and Michael Williams' life history, and we consulted with Dr. Cornell on numerous occasions prior to trial. Dr. Cornell reported to us that his findings supported the position that Michael was competent to stand trial and sane at the time of the offenses. More particularly, Dr. Cornell concluded that Michael was not suffering from "psychotic symptoms such a [sic] delusions, hallucinations, or formal thought disorder" at the time of the crimes, nor was he suffering "from a mental disease or defect which would substantially impair his awareness of his actions or his ability to distinguish right from wrong." Dr. Cornell also provided us with a list of mitigating circumstance he had identified. (Three Letters from Dr. Cornell dated 12-8-93 are attached to this affidavit).

22. Dr. Cornell never indicated to us that further testing or evaluation was necessary or advisable. We specifically discussed with Dr. Cornell whether Michael Williams had organic brain damage because we were aware, and Dr. Cornell was aware, that at the time of Michael's birth there had been complications which reportedly had resulted in Michael not breathing for a period of time. Dr. Cornell, however, informed us that he had performed his own tests, including several standard neuropsychological tests, and satisfied himself that no further testing was indicated.

23. Although one of us (Carrico) did not have any familiarity at the time with the field of neuropsychology, the other (Ford) did because he previously had attended a capital litigation seminar where the subject matter was discussed. We also were aware that Dr. Cornell was familiar with neuropsychology. If Dr. Cornell had informed us that further evaluation was necessary or advisable, we would have requested the trial judge to authorize such an evaluation.

24. We were very satisfied with the assistance provided to the defense by Dr. Cornell. We know of no substantial mitigating evidence that could have been presented but was not presented, regarding either the crimes or Michael Williams' character, history or condition. Dr. Cornell's conclusions regarding Michael's degree of cognitive impairment, history of Attention Deficit Hyperactivity Disorder, and history of prenatal complications were presented in testimony at the sentencing hearing.

The Defendant's Testimony

25. We discussed with the defendant numerous times before trial whether he should testify. We discussed it with him again at the jail the night before it was time for him to testify. And we discussed it with him again during a recess immediately before he testified, which was shortly after the trial judge ruled that we could not elicit through the defendant's brother statements the defendant had made to him about Cruse's involvement in the crimes.

26. We advised the defendant that, if he did not testify, Cruse's testimony regarding the defendant's primary role in the murders would go unrebutted and that it is likely he would be convicted as charged. On the other hand, we advised him that Mr. Von Schuch was a skilled cross-examiner and that, in our experience, defendants who testified rarely succeeded in convincing a jury.

27. If we had been successful in getting the trial judge to let us elicit through the defendant's brother the evidence we wanted to present, we would have advised the defendant not to testify. Given the trial court's adverse ruling, however, we advised the defendant of all the pro's and con's and told him that the decision ultimately was up to him. The defendant then decided for himself to testify. This was consistent with Michael's insistence throughout our preparation of that case that he wanted to tell the jury what had occurred.

28. At the penalty stage, the defendant did not testify because, in our opinion, he did not do well as a witness at the guilt stage. In particular, his demeanor on the witness stand appeared very cold. Moreover, we

knew from what he had told us about the Prince Edward murders that very damaging information could have been elicited on cross-examination regarding his premeditated decisions to shoot George Atkinson, Sr. and George Atkinson, Jr., as well as his decision to burn down the house to destroy the evidence. We also knew that the forensic evidence regarding the "contact" gunshot wound to the back of one of the other victim's head did not support Michael's contention that he had shot this person as he was charging at Michael.

/s/ R. Donald Ford
R. Donald Ford, Jr.

/s/ Lucretia A. Carrico
Lucretia A. Carrico

Subscribed and sworn before me by R. Donald Ford, Jr. this 15th day of February, 1996.

/s/ Peggy J. Franklin
Notary Public

[SEAL]

My commission expires: 8/31/96.

Subscribed and sworn before me by Lucretia A. Carrico this 15th day of February, 1996.

/s/ Illegible
Notary Public

My commission expires: 3/31/96.

AFFIDAVIT

1. I am Robert G. Woodson Jr. I was the Commonwealth's Attorney for Cumberland County from 1989 to 1995. I prosecuted both Michael Williams and Jeffrey Cruse for capital murder in 1994. I presently am a General District Court judge in the 10th Judicial Circuit.

2. During the investigation of the capital crimes for which I prosecuted Williams and Cruse, I initially entered into a written plea agreement with Cruse and his attorney whereby Cruse would have been spared a death sentence. One of the conditions of the agreement, however, was that Cruse tell the complete truth and, when it subsequently was learned that he had breached this condition with respect to the rape of Mrs. Keller, I revoked the plea agreement.

3. At the time Cruse testified against Williams in January of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty.

4. I do not recall specifically whether Williams' trial counsel were provided with an actual copy of Cruse's initial plea agreement, but I am confident that they were. A copy of this prior agreement was introduced at trial, however, and I know that Williams' attorneys were aware prior to trial of the substance of the prior agreement, as well as the fact that it had been revoked because Cruse had not been entirely truthful.

5. One of the other conditions of Cruse's initial plea agreement was that he take a polygraph test. Before such

a test was administered, however, I leaned that Cruse had not been truthful about the rape of Mrs. Keller and I revoked the plea agreement. Cruse later admitted that both he and Williams had raped Mrs. Keller. Because the plea agreement was revoked and because Cruse admitted his involvement in the rape, a polygraph examination of Cruse was not conducted.

/s/ Robert G. Woodson, Jr.
Robert G. Woodson, Jr.

Subscribed and sworn to before me by Robert G. Woodson Jr. this 14th day of February, 1996.

/s/ Carolyn Z. Helgeson
Notary Public

My commission expires: 8/30/99.

AFFIDAVIT

1. I am Donald C. Blessing. I am a lawyer licensed to practice in the Commonwealth of Virginia. Together with Lee Harrison, I represented Jeffrey Cruse on his charges of capital murder and other related felonies in Cumberland County.

2. Prior to being represented by Mr. Harrison and me, Cruse had been represented by James Baber. Before Mr. Harrison and I entered the case, Cruse and Mr. Baber had entered into a written plea agreement with the Cumberland Commonwealth's Attorney, whereby Cruse would have been spared a death sentence. This written

plea agreement, however, was revoked by the Commonwealth's Attorney because Cruse had breached the agreement by not telling the complete truth about the offenses.

3. I was present in Cumberland Circuit Court when Cruse testified for the Commonwealth at the capital murder trial of Michael Williams. At the time of Williams' trial, Cruse had no plea agreement with the Commonwealth. Cruse testified truthfully at that trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence.

4. I do not have a specific recollection of whether Williams' trial attorneys asked our permission to interview Cruse prior to Williams' trial. I can state with certainty, however, that if such a request had been made, we would not have permitted Williams' attorneys to interview Cruse.

/s/ Donald C. Blessing
Donald C. Blessing

Subscribed and sworn to before me by Donald C. Blessing this 7th day of February, 1996.

/s/ Sharon G. Palmore
Notary Public

My commission expires: October 31, 1998.

AFFIDAVIT

1. I am Joan Kuester Blanton. I am a resident of Cumberland County and I served as a juror in the capital murder trial of Michael Wayne Williams in January, 1994.

2. During the jury selection process, I was questioned about the fact that my husband is a State Trooper. I answered all of the questions truthfully and to the best of my ability.

3. At no time before, during or after the trial have I ever discussed with my husband any contacts he may or may not have had with Michael Wayne Williams in my husband's official capacity as a State Trooper. To this date, I have no knowledge of any such contacts. After I was selected as a juror, I never discussed the case of Michael Wayne Williams with my husband until the case was over.

4. The fact that my husband is a State Trooper played no part in the decisions I reached in the case. I had no knowledge of Williams' prior record until evidence of his record was introduced at trial.

/s/ Joan Kuester Blanton
Joan Kuester Blanton

Subscribed and sworn before me this 15th day of Sept., 1994.

/s/ Judy S. Illegible
Notary Public

My Commission expires: May 31, 1997

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 18th *day of* March, 1996.

Michael Wayne Williams, Petitioner,

against Record No. 951589

Warden of the Mecklenburg Correctional Center, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Applying the rule in *Hawks* v. *Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations I(A), I(B), I(C), I(D), I(E), I(F), I(G), I(H), I(J), I(K), III(C), III(H)(2), III(J), III(L), III(M) and III(U); the rule in *Slayton* v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations I(H) (to the extent petitioner relies on the prosecutor's closing arguments), I(I), I(J) (to the extent petitioner relies on gender and economic status), I(K) (to the extent petitioner relies on the length of time he will spend on death row), III(A)(1), III(A)(2), III(B), III(E), III(F), III(G), III(H)(1), III(I), III(K), III(N), III(O), III(P), III(Q), III(R), III(S), III(T), IV(A), IV(B), IV(D), IV(E), V(A); and finding no merit in petitioner's remaining allegations, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. On further consideration whereof, petitioner's motion for expert services; motion for production of Jeffrey Allen Cruse and discovery relating to Jeffrey Allen Cruse are denied. It is therefore ordered that the said petition be dismissed and the

rule be discharged. Chief Justice Carrico took no part in the consideration of this case.

A Copy,
Teste:
David B. Beach, Clerk

By: /s/ Patricia A. Krueger
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

J. D. NETHERLAND, WARDEN
MECKLENBURG CORRECTION
CENTER,

Respondent.

Civil Action No.
3:96CV529

Ex Parte
File Under Seal
Death Penalty Case

BRIEF IN SUPPORT OF MOTION
FOR FUNDS FOR EXPERT ASSISTANCE

Michael Wayne Williams ("Williams") has filed a motion, pursuant to 21 U.S.C. §§ 848(q)(9) and (10), for entry of an order authorizing the employment of experts to assist in the preparation of his petition for habeas corpus. This brief is filed in support of Williams' motion.

I.

Introduction

Michael Wayne Williams was convicted by a jury of the capital murders of Morris and Mary Keller and was sentenced to death in January 1994. His conviction was affirmed on direct appeal by the Supreme Court of Virginia on November 4, 1994, and rehearing was denied on January 13, 1995. His state habeas corpus petition was dismissed on March 18, 1996 by the Supreme Court of Virginia. Williams is indigent and this Court has appointed the undersigned counsel to represent him in this

federal habeas corpus proceeding, pursuant to 21 U.S.C. § 848(q)(4)(B). The services of a neuropsychologist, a mitigation specialist, an investigator, and a pathologist are necessary to assist Williams and counsel in the preparation of an appropriate federal petition for habeas corpus as set forth below.

II.

Neuropsychologist

Substantial evidence indicates that Williams suffered permanent organic brain damage at birth. A neuropsychological examination is required to confirm the existence and nature of such brain damage. Depending upon the neuropsychologist's findings, the existence of brain damage could provide important evidence relative to guilt of the offense or evidence in mitigation relative to sentence.

During the sentencing phase of Williams' trial, his mother testified that during her pregnancy with Williams her doctors could not detect a heartbeat or movement in the fetus for approximately two weeks. At birth, Williams was born with the umbilical cord wrapped around his neck, and the doctors who delivered Williams expressed grave concern about the baby turning blue and suffering from insufficient oxygen. At the request of Williams' counsel in his state habeas corpus petition, a neuropsychologist reviewed the mother's testimony and Williams' family and social history. The neuropsychologist concluded that there is a reasonable probability that Williams suffers from permanent organic brain damage. He

stated that a neuropsychological examination and evaluation are necessary to determine whether brain damage exists.

Williams' only expert witness at the sentencing phase of his trial, Dewey G. Cornell, Ph.D., was not qualified or trained in neuropsychology. Thus, Cornell failed to recognize the need for a neuropsychological examination to detect possible brain damage. Cornell testified only that Williams suffered from "attention deficit disorder."

Williams' state habeas corpus petition asserted claims that Williams was denied effective assistance of counsel and effective assistance of mental health experts, based in part upon the failure of trial counsel and Dr. Cornell to recognize the need for a neuropsychological examination. The Supreme Court of Virginia summarily dismissed these claims.

Given the strong probability that Williams suffers from brain damage, Williams should be provided a neuropsychologist to perform the appropriate examination and evaluation prior to filing his first federal habeas petition.

III.

Investigator and Mitigation Expert

After Williams was convicted of the February 1993 capital murders of Morris and Mary Keller, the same jury sentenced Williams to death, based largely upon the Commonwealth's evidence connecting Williams to four unadjudicated murders which occurred in Prince Edward County in December, 1992. Thus trial counsel, in effect,

were required to defend Williams against the Commonwealth's evidence of six murders, in two entirely separate incidents.

Williams' trial counsel requested appointment of an investigator to assist them. The trial court denied their request. The record in this case reveals significant areas of undeveloped evidence, relevant to both guilt and sentence.

The Commonwealth's evidence at the penalty phase of Williams' trial, linking Williams to the unadjudicated Prince Edward murders, revealed the existence of potential defenses and mitigation evidence which trial counsel failed to pursue. For example, John Williams, the younger brother of the petitioner, testified that the petitioner told him that he shot the first Prince Edward victim (Villalobos) after Villalobos argued with petitioner and threatened the petitioner with a loaded gun. According to John Williams, the petitioner told him that a second Prince Edward victim attempted to assault the petitioner before he was shot. The medical examiner's report regarding this individual showed that the victim was found in a pugilistic position, confirming Williams' testimony. John Williams' testimony also established that prior to the Prince Edward shootings he, the petitioner, and the shooting victims had all become very intoxicated.

Notwithstanding these clear indications that the Prince Edward shootings may have involved potential defenses to the crime as well as significant mitigating factors, trial counsel, without the aid of an investigator, did not develop potentially critical evidence. As a result, no significant evidence of self-defense or intoxication was

introduced by defense counsel as to the Prince Edward murders. The facts of the Prince Edward homicides merit further investigation.

Williams' state habeas corpus petition asserted claims that he was denied effective assistance of counsel and a fair trial, based in part upon the trial court's refusal to appoint an investigator and on trial counsel's failure to effectively develop evidence about the Prince Edward shootings. The Supreme Court of Virginia summarily denied these claims.

The Commonwealth's evidence relating to the Keller murders also revealed the existence of potential defenses and mitigating evidence of Williams' voluntary intoxication. Trial counsel failed to investigate and pursue this avenue of defense.

The Commonwealth's chief prosecution witness, Jeffrey Alan Cruse, testified that for eight to ten hours before the Kellers were killed, he and Williams had been drinking alcohol and using mind-altering, illegal drugs. Nevertheless, defense counsel, without the assistance of an investigator, failed to fully develop evidence of the extent and effect of Williams' intoxication at the time the Kellers were shot. Such evidence could have presented a possible defense to the crime or a significant, statutory mitigating factor in connection with the Keller murders.[1]

Williams' state habeas corpus petition asserted claims that he was denied effective assistance of counsel and a

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[1] The effects of alcohol and drugs, such as LSD and marijuana, on a brain damaged individual such as Williams merits further exploration.

fair trial, based in part upon the failure of counsel to develop and present voluntary intoxication evidence. The Supreme Court of Virginia summarily denied this claim. Both an investigator and a mitigation specialist are required to assist in the preparation of claims in this federal petition.

Factual investigation is required concerning the Commonwealth's chief prosecution witness, Jeffrey Alan Cruse. Cruse certainly must have had an agreement with the Commonwealth that it would not seek the death penalty in his case. Cruse testified against Williams, and while doing so Cruse admitted that he was a full participant in the Keller murders.

At Williams' trial, Cruse testified that he had originally reached an agreement with the Commonwealth that he would be charged with and tried for first degree murder, not capital murder. Cruse, however, testified that the deal was canceled because he lied about his part in raping Ms. Keller. The Commonwealth, therefore, elicited from Cruse testimony that left the jury believing that Cruse no longer had an agreement and that he was at risk of a death sentence while testifying against Williams.

Although Cruse was, in fact, indicted for capital murder at the time of Williams' trial, Cruse later pled guilty to capital murder, and with the enthusiastic recommendation of the Commonwealth, he received a sentence of life imprisonment when sentenced by the Court. These facts strongly suggest that Cruse had a deal at the time of Williams' trial.

There is nothing in the record or in trial counsel's files to show that Williams' trial counsel investigated the

existence of a formal plea agreement or any informal "understanding" between Cruse and the Commonwealth as to the sentencing recommendation the Commonwealth would make if Cruse testified against Williams. If Cruse had any agreement or assurance that the Commonwealth would recommend a life sentence in his case if he testified against Williams, such evidence would have been very important when challenging Cruse's testimony at the guilt phase of Williams' trial and would establish a mitigating factor relative to Williams' sentence.

Williams' state habeas corpus petition asserted claims that he was denied effective assistance of counsel and a fair trial, based in part upon the Commonwealth's representation that there was no agreement with Cruse and Williams' trial counsel's failure to effectively investigate the matter. The Supreme Court of Virginia summarily denied these claims.

Williams has effectively been denied the opportunity to investigate and develop important guilt phase and sentencing phase mitigation evidence relating to his involvement in the Keller murders and the Prince Edward killings. Williams has also been denied the opportunity to investigate any plea agreement between Cruse and the Commonwealth. Accordingly, Williams requests that this Court authorize counsel to retain the services of an experienced investigator to locate and interview witnesses and to develop other pertinent evidence.

Williams further requests that this Court authorize counsel to employ a mitigation specialist who can assist

counsel and the investigator in identifying and evaluating relevant mitigation evidence. The mitigation specialist will have to interview petitioner's family, friends, teachers, counselors, doctors, employers, and others. This will enable counsel to document petitioner's history in a legally meaningful way to establish the existence of mitigation evidence denied the jury.

Petitioner has described herein only the most obvious areas requiring further investigation and development. Petitioner's case is one that has been under-investigated throughout the trial and the state habeas corpus proceedings. Thus, counsel is at the very earliest stages of investigation and has only recently been assigned to represent petitioner. The unknown factual issues are so numerous that they pose extraordinary tactical and practical disadvantages to petitioner in his effort to file a properly pled federal habeas corpus petition in a legal framework that disfavors successive petitions. *See McFarland v. Scott*, 114 S. Ct. 2572, 2574 ("[t]he habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims . . . Furthermore, district courts are authorized to summarily dismiss petitions which appear on their face to be frivolous.") (O'Connor, J., concurring in part and dissenting in part). Thus, the assistance of experts, particularly an investigator and a mitigation specialist, are required to help petitioner discover and develop as yet unknown facts to support his claims. Without the assistance of experts, petitioner will not benefit from true federal collateral review of his conviction and sentencing as required by law.

IV.

Pathologist

Williams was convicted of the capital murder of both Morris and Mary Keller. Under well-established Virginia law only the actual perpetrator ("trigger man") may be convicted of capital murder. *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621 (1991).

The Commonwealth's pathologist testified at Williams' trial that Mr. Keller received three head wounds from a .38 caliber pistol and that either of two of those wounds alone could have been fatal. The same pathologist testified that Mrs. Keller received three head wounds, one from a .357 magnum pistol and two from a .38 caliber pistol, and that any of the three shots alone could have been fatal. Cruse and Williams gave conflicting testimony regarding the number of shots each fired and who fired the .38 caliber pistol.

Williams had no independent pathologist at the time of trial or thereafter to review the physical evidence, medical reports, testimony, and conclusions of the Commonwealth's pathologist. If the Commonwealth's pathologist was incorrect regarding the cause and nature of the Kellers wounds, there is a reasonable probability that Williams did not fire the fatal shots at either Mr. Keller or Mrs. Keller. In order to properly investigate and discover potentially exculpatory forensic evidence, Williams requires the services of a qualified forensic pathologist. The same pathologist must also review the evidence concerning the four Prince Edward County victims.

* * *

VII.

Conclusion

The services of a neuropsychologist, an investigator, a mitigation specialist, and a pathologist are reasonably necessary to assist Williams in the preparation of his petition for writ of habeas corpus. Petitioner requests this Court to authorize Williams' employment of such experts pursuant to 21 U.S.C. § 848(q)(9) and (10).

MICHAEL WAYNE WILLIAMS

By /s/ Barbara L. Hartung
Counsel

James E. Moore (VSB No. 14526)
Theodore F. Adams, III (VSB No. 26708)
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4127

Barbara L. Hartung (VSB No. 38062)
Virginia Capital Representation Resource Center
1001 East Main Street, Fifth Floor
Richmond, Virginia 23219

Counsel for Petitioner

[SEAL]

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

James S. Gilmore, III
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
804-371-8946 TDD

September 25, 1996

James E. Moore, Esquire
Christian & Barton
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095

Re: Michael Wayne Williams

Dear Mr. Moore:

This is in response to your letter dated September 23, 1996, addressed to me, Patricia Scales and Warren Von Schuch. I have advised Ms. Scales and Mr. Von Schuch, and they agree, that, because I am handling the habeas corpus proceedings involving Michael Williams, I should be the one to respond to your letter.

In your letter – which in substance is much like a discovery request that a defense attorney would file prior to trial – you ask that Ms. Scales, Mr. Von Schuch and I review our files for evidence favorable to Williams. Eric White, who represented Williams in his state habeas proceedings, sent us a similar letter, and I will give you a similar response.

Williams' trial attorneys filed a lengthy discovery request prior to trial (R. 44) and the Commonwealth

responded to that request at that time. This case, however, is no longer in a posture where the Commonwealth is a "prosecutor." You are about to file a civil habeas corpus petition in which the Commonwealth will be the named respondent. I know of no binding authority that requires the Commonwealth, as the respondent in a civil habeas proceeding, to comply with a request from the petitioner to search the State's files for favorable evidence.

With best wishes, I remain

Very truly yours,

/s/ Donald R. Curry
Donald R. Curry
Senior Assistant Attorney General
Criminal Litigation Section

cc: The Honorable Patricia D. Scales
The Honorable Warren Von Schuch

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Williams,

Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg
Correctional Center,

Respondent.

INITIAL PETITION OF MICHAEL WAYNE WILLIAMS UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND UNDER A SENTENCE OF DEATH[1]

Michael Wayne Williams, a person now in the custody of the Commonwealth of Virginia and under a

[1] In prior Orders, this Court directed that petitioner file his petition for a writ of habeas corpus on or before November 20, 1996. Petitioner, under protest, is complying with the Court's Orders and is filing this Initial Petition on November 20, 1996. However, petitioner does not thereby waive his right to file up to one year form [sic] April 24, 1996. See Petitioner's pending Motion For Recognition That Virginia Is Not An Opt-In State And That Petitioner Has A Federal Statutory Right To File His Petition For Writ of Habeas Corpus Up To One Year From April 24, 1996. Furthermore, by filing this initial petition, petitioner does not waive his rights to expert assistance in the preparation of his petition. An interlocutory appeal related to his application for such assistance was dismissed by the Fourth Circuit Court of Appeals, on November 19, 1996. Petitioner intends to renew his motion for the appointment of experts and to amend this Initial Petition.

sentence of death, hereby petitions this Court under 28 U.S.C. § 2254 for a Writ of Habeas Corpus. Williams states that he is in custody in violation of the Constitution or

* * *

GROUNDS FOR RELIEF

I. JUROR MISCONDUCT VIOLATED WILLIAMS' RIGHTS TO AN IMPARTIAL JURY AND TO DUE PROCESS OF LAW

A. JUROR STINNETT

Williams was denied his constitutional rights to be tried by an impartial jury and to be tried based only on the evidence presented at the trial. These rights were violated when the juror who served a jury forewoman failed to reveal during voir dire that one of the Commonwealth's witnesses, Deputy Sheriff Claude B. Meinhard, was her former husband and the father of her four children.[12] Meinhard was one of two officers who

[12] A copy of the divorce decree in *Meinhard v. Meinhard* and a copy of the marriage license and certificate for Harold Dewey Stinnett and Bonnie Baker Meinhard are attached as petitioner's Ex. A. As reflected by the divorce papers, Mr. Meinhard was represented by Robert G. Woodson, Jr., then a private attorney, and later one of the two prosecutors at Michael Williams' capital trial. The divorce decree was granted and signed by Judge Snoddy, the same judge who presided at petitioner's capital trial and sentenced him to death.

Juror Stinnett appeared on the prospective juror list as "Bonnie Baker Stinnett," and thus her relationship to Meinhard was not apparent.

Based on these same facts, petitioner also raises a claim of prosecutorial misconduct at Claim IV-A.4.

interviewed the co-defendant, Jeffrey Cruse, when Cruse confessed to the Keller murders and implicated Williams. Meinhard testified at Williams' trial about his investigation of the Keller homicides. Although the Commonwealth's Attorney, Woodson, had represented Meinhard in his divorce proceeding, Woodson also failed to reveal the relationship between Meinhard and the juror, Bonnie Stinnett, to defense counsel or the court. As a result, Williams could not conduct a meaningful voir dire, was unaware of this basis for challenges for cause and peremptory challenges, and was denied his right to an impartial jury and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

Stinnett never revealed her relationship to Meinhard. She was asked the following questions and gave the following responses during *voir dire*[13]:

> THE COURT: Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys [Mr. Woodson, Mr. Von Schuch, Mr. Ford, or Ms. Carrico]?
>
> JURORS: (Two [Stinnett and Carter] have no affirmative response.)
>
> MR. CHICK: Yes.

R. 575.

* * *

> THE COURT: Are any of you involved in law enforcement?

[13] The complete *voir dire* of this juror appears at R. 574-597.

> JURORS: (No affirmative response.)
>
> THE COURT: Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard . . .
>
> JURORS: (No affirmative response.)

R. 582-83.

Thus, Stinnett had at least three opportunities to set forth her relationship to Meinhard – when asked if any attorney in the case had represented her or her family, when asked if she was involved in law enforcement, and when asked if she was related to Claude Meinhard. Stinnett remained silent.[14] The prosecutor Woodson failed to elicit

[14] Defense counsel had requested more extensive questioning on voir dire than the court granted. Defense counsel proposed the following questions:

> 6. Mr. Woodson, in addition to being Commonwealth's Attorney for Cumberland County, is also engaged in the private practice of law. Is Mr. Woodson now, or has he ever acted as your attorney or represented you with respect to any matters?
>
> 7. Is Mr. Woodson, now, or has he *ever represented a party opposed to you* in any legal matter?

R. 140. (Emphasis added.)

> 9. Are any of you friendly with, associated with or related to anyone associated with the Commonwealth's Attorney's office, the Cumberland County Sheriff's Department, the Virginia State Police or any other law enforcement agency?
>
> 13. The witnesses likely to testify in this case are the following:

this information from Stinnett and never advised the court or defense counsel of his knowledge or the juror's concealment of her relationship to Meinhard.

Stinnett's failure to state that she was Meinhard's former wife is evidence of her lack of objectivity and impartiality. The Fourth Circuit Court of Appeals has recognized that deliberate concealment on *voir dire* deprives a defendant of his right to a fair trial and mandates reversal of the conviction:

> Certainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness [footnote omitted] of a potential juror's answers on *voir dire*, the result is deprivation of the defendant's rights to a fair trial. [The juror] by his concealment impaired the right of [the defendants] to exercise intelligently a peremptory challenge to remove a juror who was suspected of being partial [footnote omitted].

United States v. Bynum, 634 F.2d 768, 771 (4th Cir. 1980). In *Bynum*, the juror had failed to reveal that family members had been convicted of criminal offenses. *See also United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977) (voir dire that has the effect of impairing the defendant's ability to

---

> (list witnesses)
>
> Do you known [sic] any of these witnesses? Are you related by blood or by marriage or are you friends with any of these witnesses?

R. at 140. Defense counsel objected to the court's denial of all disallowed questions. R. at 500.

exercise intelligently his challenges is ground for reversal, irrespective of prejudice); *United States v. Brown*, 799 F.2d 134 (4th Cir. 1986) (same).

The Second Circuit Court of Appeals reached the same result in *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989), citing *Bynum*. In that case, the juror allegedly failed to reveal that her brother-in-law was a government lawyer when asked several specific questions designed to elicit that information. The juror purportedly withheld this information since she wanted to serve on the jury. In remanding the case, the Court of Appeals stated that a deliberately false answer on *voir dire*, itself a criminal act, "reflected an impermissible partiality on the juror's part." *Id.* at 151. As a result, the defendant was "prevented from intelligently exercising his peremptory and causal challenges because of the juror's intentional nondisclosure." *Ibid. See United States v. Perkins*, 748 F.2d 1519, 1531-33 (11th Cir. 1984) (refusal to disclose, *inter alia*, that juror knew defendant gives rise to presumption of actual bias); *McCoy v. Goldston*, 652 F.2d 654, 658 (6th Cir. 1981) (district court shall presume bias where juror deliberately concealed information). In petitioner's case, no remand is necessary since the fact of the relationship is demonstrated by court documents.

The Tenth Circuit Court of Appeals affirmed the granting of the writ where a juror failed to reveal that she was involved in an abusive family situation, and the defendant was on trial for killing her abusive husband. *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991), *cert. denied* 113 S.Ct. 1879 (1993). The Court held that the juror's dishonesty was itself evidence of bias and that the defendant had been denied the right to a fair trial. *Id.* at

1159. The juror had failed to answer a material question, and a correct response to the question would have provided a basis for a challenge for cause. *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984).

Had Stinnett revealed her relationship to Deputy Sheriff Meinhard, defense counsel could have challenged her for cause. The ex-spouse of a witness cannot be viewed as a neutral and impartial juror, who is charged with assessing the credibility of witnesses. *United States v. Brown*, 799 F.2d 134 (4th Cir. 1986) (juror's knowledge of witnesses is relevant to issue of impartiality); accord *United States v. Washington*, 819 F.2d 221 (9th Cir. 1987) (reversible error to refuse to ask prospective jurors if they know prosecution's witnesses). Petitioner's ability to exercise his right to peremptory challenges was also impaired given Stinnett's failure to answer honestly. "The denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice[.]" *Swain v. Alabama*, 380 U.S. 202, 2190 (1965); *Knox v. Collins*, 928 F.2d 657, 661 (5th Cir. 1991); *United States v. Rucker, supra*, at 1049.

Stinnett's impartiality and credibility were further drawn into question when she denied hearing or reading any news stories or reports about the defendant or the case. R. at 577. Stinnet is educated and is a high school teacher in the community. The Keller murders were highly publicized in this small community. It is simply implausible that she had no prior knowledge of the case. Her failure to provide truthful answers further demonstrates her actual bias.

Juror bias constitutes a structural defect in the trial process and is not amenable to harmless error analysis. Such an error infects the entire trial process and requires automatic reversal of the conviction and sentence. *Brecht v. Abramhamson*, 507 U.S. 619 (1993); *Arizona v. Fulminante*, 499 U.S. 279 (1991). For these reasons, the writ must be granted as to Williams' conviction and sentence.

B. JUROR BLANTON

A hearing is required on the possible introduction of extrajudicial evidence by a juror whose law enforcement husband had, unknown to the trial court, arrested the petitioner on several occasions. Although the jury was sequestered during the trial itself, the jurors were permitted to return home after being chosen from the venire, i.e., *after* they learned the identity of the defendant and the nature of the trial. No hearing has ever been conducted to determine whether the juror in question – Joan K. Blanton, married to a Virginia State Trooper – received information from her husband about the petitioner that night or shared any resulting information later with her fellow jurors. Because the strong possibility of extrinsic evidence here implicates petitioner's most fundamental rights, petitioner should be granted a hearing to determine what information was introduced and whether a new trial or sentencing is warranted.

It should be noted that Joan Blanton gave an affidavit for purposes of state habeas. Respondent's State Habeas Brief. Exhibit E. In that affidavit, Blanton stated that she answered the trial court's voir dire questions truthfully and, during the trial, did not know of her husband's

arrests of Williams. But this seven-sentence affidavit, which was offered at the request of the Commonwealth after Williams discovered the problem during his direct appeal, must be considered too thin a wedge with which to block an evidentiary hearing on the subject. The state courts permitted the Commonwealth to use this affidavit to settle the issue. Williams has never had the opportunity to interview Blanton or to develop her testimony or cross examine her before a trier of fact. As demonstrated below, this issue goes to the very core of the Constitution's guarantees of due process and fair trial, and it must not be dismissed without, at a minimum, a full evidentiary hearing on the matter.

The rights implicated by possible extrinsic evidence in this context are the most fundamental in criminal law: confrontation, cross examination and counsel, among others. The central concern of the Sixth Amendment's confrontation clause is to assure the reliability of evidence against a criminal defendant by subjecting that evidence to rigorous testing in an adversary proceeding. *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Amendment guarantees a defendant the opportunity to examine and confront any evidence via a "personal examination." *Id.* Sixth Amendment rights are always implicated when a juror introduces evidence which has not been admitted at trial, and information not part of the proper record is "presumptively prejudicial." *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2nd Cir. 1994), *citing Remner v. U.S.*, 347 U.S. 227, 229, 98 L.Ed. 654 (1954).

In the Fourth Circuit, the *Remner* presumption of prejudice is particularly strong. *E.g., Stockton v. Commonwealth*, 852 F.2d 740, 744 (4th Cir. 1988); *U.S. v. Barnes*, 747

F.2d 246, 250 (4th Cir. 1984). The standard in the Fourth Circuit for determining whether the defense was prejudiced is clear: if there is a reasonable possibility that the jury's verdict was *influenced* – not controlled, but merely influenced – by improper material before it, then the defense is prejudiced and a new trial is warranted. *Barnes*, 747 F.2d at 251. The burden is on the government to prove harmlessness, and prejudice is strongly presumed. *Id.* at 251.

Stockton and *Barnes*, applied to the facts of this case, indicate that petitioner Williams is at a minimum entitled to an evidentiary hearing in this Court on the issue of extrinsic evidence. Juror Blanton returned home the night after her selection well aware of the sensational status of case she was about to hear – like every juror, she had been exposed to great publicity and remembered hearing about the case in the media. *E.g.*, R. 635. Blanton was already deeply connected to the case: she had attended high school in Keller's class and knew him by his familiar nickname, "Kippy" (R. 628); she had once known the petitioner's mother and knew the petitioner himself as a child (R. 639-40); and Blanton herself had been the victim of sexual abuse (R. 638-39). It strains credulity – or at the very least should not be presumed on habeas review – that such a juror would not mention such a case to her spouse that evening at home. And the obvious product of that mention – a connection to her husband's arrestees – would have extremely prejudiced the defense.

The key issue to the prosecution at the sentencing phase was future dangerousness, and at that point the petitioner's other offenses were admitted. However, Blanton provides an opportunity by which such information

could have seeped into the jury at the guilt phase, which could have seriously undermined the petitioner's credibility. Because Williams' credibility was crucial if the jury were to disbelieve Cruse's account and find that Williams was not the triggerman, this direct avenue for biasing the jury must be explored at some point in the appeals process.

Stockton and *Barnes*, while factually distinct, involve the same underlying rights as Williams' case. In *Barnes*, physical exhibits improperly reached the jury, and one exhibit contradicted the defendant's testimony on his whereabouts by showing the locations from which phone calls were made. 747 F.2d at 249-50. Similar to Williams' case, in *Barnes* it was not known whether the jury used the information to undermine the defendant's credibility, but only that the information was available. *See id.* at 250. And *Barnes* was a non-capital case; therefore, in the death penalty context, the court must be at least as strict.

Along the same lines, *Stockton* involved a particularly egregious comment but is nonetheless applicable to the case at hand. In *Stockton*, several jurors while on their lunch break heard a restaurant employee state, upon learning of their role in a capital murder trial, that "they ought to fry the son-of-a-bitch." 852 F.2d at 742. While the strength of any statement by the tainted juror in the present case is of course unknown, *Stockton* is similar because in that case as in the current one, the trial Court failed to make any finding or inquiry into the impact of the statement. *Id.* at 745. The Fourth Circuit found that a prejudicial statement made to the jury mandated an evidentiary hearing on habeas, *id.*, and while it did not disturb the sentence of guilt, the Fourth Circuit did affirm

a reversal and remand on the capital sentence phase. *Id.* at 749.

This Court would not tolerate a trial judge's permitting a closed-door session in which the jury spoke with a key prosecution witness at length, then be satisfied by a one-page affidavit offered months later to the effect that nothing untoward transpired. Blanton is, or could be, such a witness. Williams has been permitted no opportunity to cross-examine or confront this potential accuser, a violation of his Sixth Amendment rights, despite the fact that evidence introduced by a juror is presumptively prejudicial. It must be emphasized that the standard for presuming prejudice is only that there exists a reasonable possibility that the outcome was merely influenced by Blanton. Such a possibility exists and entitles Williams at a minimum to an evidentiary hearing or a new sentencing phase.

The error present in all these cases he [sic] introduction of extrinsic material facts may have occurred in petitioner's case based on information conveyed to juror Blanton. Petitioner's rights to confrontation, a fair trial, and due process as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution may have been compromised. Petitioner requests a hearing on this issue and an opportunity to conduct investigation and discovery prior to such hearing.

* * *

IV. PROSECUTORIAL MISCONDUCT DEPRIVED WILLIAMS OF A FAIR TRIAL AND DUE PROCESS.

A. GUILT PHASE

1. THE COMMONWEALTH FAILED TO DISCLOSE ITS AGREEMENT WITH THE CHIEF PROSECUTION WITNESS, CRUSE, AND ACTIVELY MISLED THE JURY REGARDING AN AGREEMENT WITH CRUSE

Williams' trial counsel filed a discovery motion requesting, among other things, all *Brady* information, including information concerning any formal or informal agreement or understanding with any witness for the Commonwealth. R. 14, 18-19. The trial court denied the discovery motion, but ordered the Commonwealth to comply with all discovery requirements under the Rules of the Supreme Court of Virginia and relevant case law. R. 54. The Commonwealth was therefore required to disclose any exculpatory evidence or any evidence that could be used to impeach the Commonwealth's witness. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 115 S.Ct. 1555 (1995); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988). Any formal or informal agreement between the Commonwealth and Jeffrey Cruse, Williams' co-defendant, was plainly within the scope of *Brady* and had to be disclosed.

Prior to trial the Commonwealth informed Williams' counsel that the Commonwealth had at one time reached a plea agreement with Cruse, that the agreement had been breached by Cruse, and that no other agreement existed. No copy of any written agreement was produced,

and, until that agreement was introduced by the Commonwealth at trial, Williams' counsel thought the original agreement had been oral. Exhibit to State Habeas Petition, Affidavit of R. Donald Ford, Jr.

At trial, the Commonwealth elicited from Cruse on direct and redirect examination that he was charged with capital murder and that an agreement with the Commonwealth not to seek the death penalty had been withdrawn because he had not confessed to his involvement in the rape of Mrs. Keller in his original statements. R. 954, 973-976. The Commonwealth introduced into evidence as Commonwealth's Exhibit 13 the original and supposedly void written agreement with Cruse dated March 2. 1993. R. 263. The agreement provided that in return for Cruse's cooperation and testimony against Williams, the Commonwealth would not seek the death penalty against Cruse. R. 263.

Thus, the jury in Williams' case was left with the clear impression that there was no longer any agreement with Cruse for leniency in return for his testimony against Williams.

Notwithstanding the Commonwealth's trial posture that there was no agreement with Cruse, the record in Williams' and Cruse's cases, considered as a whole, demonstrates that there was such an agreement.

On March 14, 1993, Cruse pled guilty to the capital murder of Mrs. Keller. By agreement with the Commonwealth, the charge of first degree murder of Mr. Keller was amended to charge Cruse with participation as a principal in the second degree. Exhibit to State Habeas Petition, Transcript, March 14, 1994, at pp. 10-13. Cruse's

guilty plea came just two months after Williams' conviction and before a trial date was even established in Cruse's case. On March 25, 1994, the Commonwealth's Attorney for Prince Edward County wrote to Cruse's defense counsel offering to testify on Cruse's behalf at sentencing in return for Cruse's cooperation in prosecuting Williams in the Prince Edward case. *See* Exhibit e. On April 26, 1994. following a recommendation of the Commonwealth's Attorney for Cumberland County that Cruse's life be spared, the trial court sentenced Cruse to life in prison on his guilty plea to capital murder. Transcript, April 26, 1994. The Commonwealth based its sentencing recommendation primarily upon Cruse's cooperation in convicting Williams. *Id*. This sequence of events in itself strongly suggests that an agreement between Cruse and the Commonwealth existed when Cruse testified against Williams.

Even more telling, however, are statements of the Commonwealth's Attorney made during Williams' trial. After eliciting from Cruse testimony that his original agreement with the Commonwealth had been withdrawn, the Commonwealth's Attorney sought to emphasize the absence of any agreement, questioning Cruse as follows:

> Q: You've indicated to the jury you're charged with capital murder right now; is that correct?
>
> A: Correct.
>
> Q. Is it your understanding that *the Judge is going to decide whether you live or die*?
>
> A. Correct.

R. 976 (Emphasis supplied).

These questions and answers make it abundantly clear that at the time of Williams' trial both the Commonwealth and Cruse knew that Cruse would plead guilty to capital murder, thereby waiving his right to a jury and requiring sentence to be imposed by the Court. The conclusion is, therefore, inescapable that the Commonwealth and Cruse had an understanding regarding a sentencing recommendation by the Commonwealth.

The final argument of the Commonwealth's Attorney at the guilt phase of Williams' trial also supports the conclusion that there was an agreement with Cruse. Attempting to persuade the jury that Cruse's testimony against Williams was not motivated by any agreement, the Commonwealth's Attorney argued:

> . . . he [Cruse] sits here today facing the death penalty; he sits here facing capital murder. two counts of capital murder. *And like he told you right now his back is against the wall; if he lies, he dies*, and that is his situation. R. 1278 (Emphasis supplied).

The only reasonable inference from the foregoing statement of the Commonwealth's Attorney is that there was a direct relationship between the content of Cruse testimony and his sentence on charges of capital murder. Unless Cruse told the story the Commonwealth wanted, he would face the death penalty.

Looking at the record as a whole, there can be no reasonable doubt that the Commonwealth had an agreement with Cruse that, in exchange for his expected testimony against Williams, he would receive a recommendation from the Commonwealth for a life sentence as opposed to the death penalty when he pled guilty to

capital murder. The Commonwealth's failure to disclose such an agreement to Williams' counsel prior to trial severely limited their ability to effectively cross-examine the Commonwealth's key witness against Williams. As a result, Williams was denied due process and a fair trial. *Bagley, supra.* Given the critical role that Cruse played in the Commonwealth's case against Williams. there is a reasonable probability that the outcome of Williams' trial would have been different if the agreement had been disclosed. *United States v. Bagley,* 473 U.S. at 682; *Kyles v. Whitley,* 115 S.Ct. at 1566. The writ should be granted.

2. THE COMMONWEALTH FAILED TO DISCLOSE A PSYCHIATRIC EVALUATION OF CRUSE CONTAINING BRADY INFORMATION

In September 1993, while incarcerated for the Keller murders, Cruse, the Commonwealth's key witness against Williams, was evaluated by Mario Gomez, a psychiatrist affiliated with the Goochland-Powhatan Community Services Board. An evaluation based upon an interview with Cruse reports that "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time." *See* Exhibit D.

The Commonwealth would have certainly known of the September 1993 psychiatric report concerning Cruse prior to Williams' trial in January 1994. Notwithstanding the Court's September 15, 1993 order to disclose all *Brady* material, the Commonwealth failed to disclose the psychiatric report.

The statement in Dr. Gomez's report concerning Cruse's intoxication at the time of the Keller murders and his poor recollection was obviously *Brady* information which had to be disclosed by the Commonwealth to Williams' counsel. *United States v. Bagley,* 473 U.S. 667 (1985). Cruse's testimony was absolutely vital to the Commonwealth's ability to convict Williams of capital murder. The Gomez report would have provided Williams' counsel with a powerful tool for cross-examination of Cruse's critical testimony against Williams concerning triggerman issues.

There is a reasonable probability that if the Cruse psychiatric report had been disclosed the result of Williams' trial would be different. Williams was denied his right to a fair trial guaranteed by the Fifth and Fourteenth Amendments. *United States v. Bagley,* 473 U.S. 667 (1985); *Kyles v. Whitley,* 115 S.Ct. 1555 (1995). The writ should be granted.

* * *

5. THE COMMONWEALTH FAILED TO REVEAL AT VOIR DIRE THAT STINNETT'S FORMER HUSBAND WOULD BE A TRIAL WITNESS AND THAT SHE HAD FAILED TO REVEAL THEIR RELATIONSHIP TO THE COURT AND COUNSEL.

As set forth in Claim I-A, *supra,* juror Stinnett failed to reveal that one of the Commonwealth's witnesses, Claude Meinhard, was her ex-husband and the father of her four children. Stinnett had several opportunities to state her relationship to Meinhard during voir dire and

failed to do so. She was, for example, asked if any of the attorneys participating in the trial had represented her or any member of her family. Stinnett failed to state that Commonwealth's Attorney Robert G. Woodson, Jr., when in private practice, had represented Claude Meinhard during their divorce proceedings in 1979.

Prosecutor Woodson also failed to advise the trial court of his relationship to Claude Meinhard and thus to juror Stinnett. An attorney may not remain silent when a prospective juror provides a false or misleading answer during voir dire. Woodson was aware of Stinnett's relationship to Meinhard based on his own representation of Meinhard. Moreover, Stinnett's relationship to Meinhard was well-known in the community as evidenced by the fact that some jurors still referred to Stinnett by her former name, Meinhard. Pet. Ex A.

Woodson's silence deprived Williams' counsel of information required to challenge Stinnett for cause. She was not an impartial juror, and her bias was demonstrated further by her failure to provide truthful and complete answers on voir dire. Woodson was guilty of prosecutorial misconduct for failure to advise the court and defense counsel of Stinnett's relationship to Meinhard. His conduct does not fall under the trial error analysis of *Brecht v. Abrahamson, supra,* since the presence of Stinnett on the jury created a structural defect in the trial and cannot be subject to harmless error analysis. *See Arizona v. Fulminate,* 499 U.S. at 289-90 (1991). As a result, Williams was denied his right to an impartial jury, due process, and a fair and impartial trial at both guilt and sentencing in violation of his rights under the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the U.S. Constitution. The writ must be granted.

* * *

9. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO NUMEROUS IMPROPER AND MISLEADING STATEMENTS BY THE COMMONWEALTH IN OPENING AND CLOSING ARGUMENTS DURING THE GUILT/INNOCENCE PHASE OF THE TRIAL.

Both Commonwealth's Attorneys, Robert Woodson and Warren Von Schuch, delivered arguments during the guilt/innocence phase of the trial. Counsel failed to object to even one of the numerous misrepresentations and other instances of improper arguments. Counsel was ineffective in failing to object to or argue numerous misrepresentations and other instances of improper opening and closing arguments by the Commonwealth at the guilt phase of the trial.

In its opening argument, the Commonwealth informed the jury that the victims' place of business was next to the Williams' mother's house. R. 787. That fact was never established by any testimony, but was a significant part of the Commonwealth's case on motive. Williams allegedly chose the victims because he knew them and their habits. As such, this was argument of facts not in evidence, a misrepresentation of the evidence, and, therefore, objectionable.

During closing argument, the prosecution argued that it is "uncontradicted that the victims had not been

out that night". R. 1249. Their whereabouts prior to the offenses were never discussed. As such, this was argument of facts not in evidence, a misrepresentation of the evidence, and, therefore, objectionable.

The vaginal swab taken from Mrs. Keller revealed the presence of semen that could not have been that of her husband. In closing argument, the Commonwealth argued that George Li, the Commonwealth's DNA expert, testified that both Cruse and Williams could have raped Mrs. Keller, (R. 1256.) and did rape Mrs. Keller (R. 1257.) Li actually testified that he could not tell whether Williams had intercourse with the victim because the DNA taken from Cruse would have masked Williams. As such this was a misrepresentation and misstatement of the evidence, and, therefore, objectionable.

In closing at the guilt phase, the Commonwealth argued that Lisa Schiermeier, the Commonwealth's serologist, testified that there was "no question that Mr. Williams raped Mrs. Keller". R. 1264. Her testimony was actually that she found semen consistent with Williams' blood type in Mrs. Keller's vaginal swab. As such, this was a misstatement and misrepresentation of the evidence, and, therefore, objectionable.

In his closing argument, Commonwealth's Attorney Von Schuch, mentioned Cruse's reaction to the pictures of the Kellers he was shown during the investigation. Von Schuch offered his own testimony in argument that "I asked him what happened and he said he lost it, and, boy did he ever. And when he got on the witness stand here, he broke down again, . . . " R. 1277. Von Schuch, without opposition, characterized Cruse's initial reaction as being

even more dramatic than Cruse's reaction at trial. The record is silent as to any emotional reaction Cruse may have had when improperly shown pictures on redirect examination, R. 978-979, was an improper and prejudicial injection of his argument personal opinions regarding the credibility of witnesses and evidence, and therefore, objectionable.

In that portion of the Commonwealth's closing argument delivered by Woodson, the jury was told that law enforcement officers had no evidence to charge Cruse with the murders after he made the statement in which he omitted mention of the rape of Mrs. Keller. R. 1253. Yet Cruse had previously told law enforcement officials that he had shot Mrs. Keller in the head. His omission of the rape did nothing to void the effect of his admissions to other crimes. This argument was a misstatement, and misrepresentation of the evidence and, therefore, objectionable.

In his closing argument, Commonwealth's Attorney Woodson repeatedly and improperly injected his own opinion as to the credibility of witnesses and evidence. Referring the Commonwealth's witness, he argued that "these are believable people" R. 1262. Woodson further argued that Cruse was "telling it like it is", R. 1263. Woodson also improperly interjected personal experience and opinion. "If you scale this case on 1 to 10, I will tell you this is a maximum case, it is a serious case." R. 1264. As such, these statements were objectionable.

During the rebuttal portion of the Commonwealth's closing argument at the guilt/innocence phase of the trial, Von Schuch, argued that Cruse

> [s]its here today facing the death penalty; he sits here facing capital, two counts of capital murder. And like he told you right now, his back is against the wall; *if he lies, he dies*, and that's his situation. (R. 1278). (Emphasis added)

The last portion of the statement is unequivocal. The only possible interpretation of this argument is that if Cruse tells the truth, he will live. If true, it is clear that Cruse will be rewarded for his testimony. This was a direct contradiction to the evidence offered by the Commonwealth during its examination and redirect examination of Cruse that he had no "deal.". It was a material misstatement and misrepresentation of the evidence and, therefore, clearly objectionable.

The net effect of this series of misstatements, misrepresentations and personal opinions was extreme prejudice to Williams. Each of these instances and statements would have called for cautionary instructions if not legitimate requests for a mistrial. A mistrial motion should have been made where the Commonwealth injected their personal opinions.

Even if the individual misstatements, misrepresentations or personal opinions were not sufficient to grant a mistrial, their cumulative effect, if considered on appeal, would have most likely resulted in a reversal. Counsel's failure to object deprived Williams of a valid issue on appeal.

No verdict rendered after such arguments can be considered reliable. As none of these mistakes, misrepresentations or improprieties were objected to, Williams was denied effective assistance of counsel, in violation of

his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

* * *

WHEREFORE, for the reasons set forth above Williams prays that this Court grant the following relief:

a. Issue a writ of habeas corpus commanding Respondent to bring Williams before the Court to the end that he may be discharged from his unconstitutional confinement and/or be relieved of his unconstitutional sentence of death;

b. Conduct a plenary hearing on this Petition and accord Williams the right to present witnesses, exhibits, and argument of counsel;

c. Grant Williams the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts as alleged in this Petition, and to permit any other discovery allowed by law;

d. Grant Williams leave to amend this Petition in light of any facts uncovered through further investigation, discovery or testimony;

e. Allow Williams a period of at least ninety (90) days, which period shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law and facts raised by Williams;

f. Grant Williams such other relief to which he may be entitled or which the court deems just and proper.

MICHAEL WAYNE WILLIAMS

BY /s/ Barbara L. Hartung
Counsel

Mark E. Olive,
pro hac vice
Barbara L. Hartung,
VSB #38062
Virginia Capital
Representation
Resource Center
1001 East Main Street,
5th Floor
P. O. Box 507
Richmond, Virginia
23204-0506

James E. Moore
VSB #14526
Theodore Adams, III,
VSB #26708
Hill B. Wellford, III,
VSB #38938
Christian & Barton, L.L.P.
909 East Main Street,
Suite 1200
Richmond, Virginia
23219-3095
(804) 697-4100

November 21, 1996

INDEX TO EXHIBITS

EXHIBIT A Court Records Related To Barbara Meinhard Stinnett

EXHIBIT B Affidavit of Doris Pye

EXHIBIT C Newspaper Articles on Williams' Arrest And Trial

EXHIBIT D Psychiatric Report on Cruse Dated September 14, 1993

EXHIBIT E Commonwealth Attorney's Letter On Behalf Of Cruse, Dated March 25, 1994

Exhibit A

VIRGINIA:

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

BONNIE B. MEINHARD Complainant,

vs.

CLAUDE B. MEINHARD Defendant.

DECREE

This cause came on this day to be heard upon the Bill of Complaint, duly matured and set for hearing, upon process accepted by the Defendant, upon depositions of witnesses taken on behalf of the complainant after notice duly served upon defendant, and was argued by counsel.

And it appearing to the Court, independently of the admissions of either party in the pleadings or otherwise, that the parties were married on the 24th day of February, 1962, in the County of Gaffney, State of South Carolina,

and both parties are members of the white race; that there were four children born of the said marriage; namely, Brandon Todd Meinhard, born on May 7, 1972, William Troy Meinhard, born on January 4, 1966, Claudia Ann Meinhard, born on August 18, 1964, and Tracy Dean Meinhard, born on September 28, 1962; that the parties are over the age of eighteen years; that the complainant hereto has been an action bona fide resident of and domiciled in the State of Virginia for more than six months next preceding the commencement of this suit; and that the parties last cohabited in the County of Cumberland, State of Virginia; and that the complainant has lived separate and apart, without interruption, from the defendant since July 25, 1977.

It is accordingly ADJUDGED, ORDERED and DECREED that the complainant, BONNIE B. MEINHARD, is now absolutely divorced from the defendant, CLAUDE B. MEINHARD, from the bond of matrimony on the grounds of having lived separate and apart, without interruption, and without cohabitation for over one year; and the bond of matrimony created by this marriage between the parties on February 24, 1962, is dissolved.

And it appearing to the Court that the complainant is a proper and fit person to have custody of the children born of the aforesaid marriage, it is further ADJUDGED, ORDERED and DECREED that the custody of Brandon Todd Meinhard is granted to the complaint with reasonable visitation rights to the defendant and that all further matters concerning the custody and support of Brandon Todd Meinhard, William Troy Meinhard, Claudia Ann Meinhard and Tracy Dean Meinhard be and are hereby

referred to the appropriate Juvenile and Domestic Relations Court having jurisdiction of such matters.

And this cause is removed from the docket.

Enter this 10th day of Sept., 1979.

/s/ Illegible
JUDGE

I ask for this:

/s/ Robert G. Woodson, Jr.
Robert G. Woodson, Jr.
Counsel for Complainant

Seen:

/s/ Claude B. Meinhard
Claude B. Meinhard

Entered
16/71

COMMONWEALTH OF VIRGINIA

MARRIAGE REGISTER

COPY A FOR CLERK OF COURT

CITY OR COUNTY OF Cumberland

NAME OF COURT Circuit

CLERK'S NUMBER 24

GROOM

1. FULL NAME OF GROOM

(first)	*(middle)*	*(last)*
Harold	Dewey	Stinnett

2. AGE 38 YEARS

3. DATE OF BIRTH *(Month, Day, Year)*

1-20-50

4. PLACE OF BIRTH *(state or foreign country)*

Virginia

5. RACE White

6. NUMBER OF THIS MARRIAGE Second

7a. MARITAL STATUS *(if previously married)*

WIDOWED [ ] DIVORCED [X]

7b. DATE LAST MARRIAGE ENDED

July 1977

8. EDUCATION 9

9a. USUAL RESIDENCE STREET ADDRESS OR RT. NUMBER

Route 1, Box 32

9b. CITY OR TOWN OF RESIDENCE Cartersville

9c. COUNTY Cumberland

9d. STATE (OR FOREIGN COUNTRY) Virginia

10. NAME OF FATHER David Wilson Stinnett

11. FULL MAIDEN NAME OF MOTHER

Martha J. McCarter

BRIDE

12. PRESENT NAME OF BRIDE

(first)	*(middle)*	*(last)*
Bonnie	Baker	Meinhard

MAIDEN SURNAME Baker

13 AGE 46 YEARS

14. DATE OF BIRTH *(Month, Day, Year)*

11-15-41

15. PLACE OF BIRTH

Virginia

16. RACE White

17. NUMBER OF THIS MARRIAGE *(first, second, etc.)*

second

18a. MARITAL STATUS, *(if previously married)*

WIDOW [ ] DIVORCED [X]

18b. DATE LAST MARRIAGE END 1979

19. EDUCATION *(Specify only highest grade completed)*

(Elementary or Secondary 0-12) 12

College (1, 4 or 5+) 4+

20a. USUAL RESIDENCE STREET ADDRESS OR RT. NUMBER

Route 1, Box 32

20b. CITY OR TOWN OF RESIDENCE Cartersville

20c. COUNTY Cumberland

20d. STATE (OR FOREIGN COUNTRY)

Virginia

21. NAME OF FATHER William Abernathy Baker

22. FULL MAIDEN NAME OF MOTHER

Ann Marie Rhodes

MARRIAGE LICENSE

23. TO ANY PERSON LICENSED TO PERFORM MARRIAGES

* * *

Date Issued September 12, 1988

License Expires Sixty Days After Above Date

Date Received by Clerk of Court from Officiant

10-4-88

Signature /s/ Carol O. Henshaw, Deputy
Clerk of Court or Deputy

MARRIAGE CERTIFICATE

24. DATE OF MARRIAGE *(Month, Day, Year)*

October 1, 1988

25. PLACE OF MARRIAGE Prince Edward VIRGINIA

26. TYPE OF CEREMONY CIVIL [X] RELIGIOUS [ ]

STATE OF VIRGINIA

County of Cumberland, to-wit:

I, Carol O. Henshaw, Clerk of the Circuit Court of the County of Cumberland, the same being a Court of record having a seal, do hereby certify that the foregoing is a true copy of the marriage record of Haroid Dewey Stinnett and Bonnie Baker Baker [sic] Meinhard, which is of record in my said office in Marriage Register No. 4, at page 6.

In testimony whereof, I have hereto set my hand and annexed the seal of the said Court, this 22nd day of October, 1996.

/s/ Rudy C. Stout, Deputy Clerk,

The Commonwealth of Virginia,

To the Sheriff of the County of Cumberland, Greeting:

The following is a list of the names of jurors drawn pursuant to Virginia Code Section 8.01-348 and prepared under Code Section 8.01-361 for the trial of the case of Commonwealth vs. Michael Wayne Williams accused of felonies and all other cases to be tried the Sept. 1993 Term of this Court. You will notify ____ of the persons on said list to attend the Circuit Court of the County of Cumberland on the 3rd day of January, 1994, and you will then and there make return of this list to the Clerk of the said Court, to wit:

	NAME	ADDRESS	OCCUPATION
1	Betty Farley Boggs	Route 1, Box 23 Cartersville, VA 23027	
2	Harry Moulton Chapman	Route 1, Box 2950 Farmville, VA 23901	
3	Walter Bernell Copeland	184 Cook Road Farmville, VA 23901	
4	Gary Edward Davis	721 Monroe Street Farmville, VA 23901	

5 William Michael Duker
Route 1, Box 1055
Farmville, VA 23901

6 Leroy Frederick Fahrner
410 John Randolph Road
Farmville, VA 23901

7 Alex Joseph Fazekas
802 Osborn Road
Farmville, VA 23901

8 Lottie Hatcher Goff
Route 3, Box 45B
Powhatan, VA 23139

9 Oscar Wayne Harper
1853 Cumberland Road
Farmville, VA 23901

10 Juanita Higgins Hazlegrove
Route 1, Box 1735
Farmville, VA 23901

11 Pearl P. Hickman
Route 1, Box 2370
Farmville, VA 23901

12 Christine Booker James
Route 2, Box 254
Cumberland, VA 23040

13 Walter Blanton McKay
P. O. Box 21
Farmville, VA 23901

14 James Warren Miller
Route 2, Box 141A
Cumberland, VA 23040

15 Christine Warren Morris
Route 1, Box 15
Cumberland, VA 23040

16 Joanne Smith Petty
Route 1, Box 227
Cumberland, VA 23040

17 Mary Sutton Sloan
Route 3, Box 209
Cumberland, VA 23040

18 Tiffany Latrese Smith
Route 4, Box 27
Farmville, VA 23901

19 Beverely White Spain
Route 4, Box 317
Farmville, VA 23901

20 Bonnie Baker Stinnett
Route 1, Box 32
Cartersville, VA 23027

21 Norma Quesenberry Tipton
Route 1, Box 178A
Cartersville, VA 23027

22 Robert Perry Turpin
Route 1, Box 114
Cartersville, VA 23027

23 Albert Franklin Watson, Jr.
Route 3, Box 307
Cumberland, VA 23040

24 Anne Booker Womach
703 Monroe Street
Farmville, VA 23901

25 Wilma Randolph Word
Route 4, Box 321
Farmville, VA 23901

26

27

28

Given under my hand as Clerk of the said Court, this 20th day of December, 1993

/s/ Imogine N. Tunstall, Clerk
Circuit Court of the County of Cumberland

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS **Civil 3:96CV529**

Petitioner,

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center,

Respondent.

AFFIDAVIT OF DORIS PYE

I, Doris Pye, do swear and affirm that the following is true and correct to the best of my knowledge and recollection:

1. I am fifty-three years old, a resident of Harrisonburg, Virginia, and a Summa Cum Laude graduate of

James Madison University. I am licensed by the Commonwealth of Virginia as a private investigator and Private Security Services Compliance Agent. I completed the American Bar Association paralegal studies program at James Madison University in 1983, and immediately thereafter was employed by the Harrisonburg law firm of Hoover, Penrod, Davenport & Crist as a general practice paralegal and in-house investigator. My first capital murder procedure experience was acquired when I assisted David A. Penrod of that firm with *Commonwealth v. Johnson* in 1987-1988. Since that time, I completed the Commonwealth of Virginia Private Investigator training at Piedmont Virginia Community College (May of 1992), and the Department of Criminal Justice Services basic training for Private Security Compliance Agents, at the Virginia State Police Academy (July of 1992). I resigned from the Hoover firm and established a private investigative firm in August of 1992. Since 1992 I have been involved with the litigation of over 20 Virginia murder cases, including the following: five trial level court appointments as investigator where capital murder was charged; nine postconviction capital murder investigations; two privately retained first degree murder cases; one court appointment in a first degree murder charge against a juvenile; and three court appointments in U.S. district court where murder was charged.

2. On October 11 and 12, 1996, I interviewed five of the jurors from Michael Williams' capital trial. In the course of these interviews, the jurors disclosed the following information to me.

3. Three jurors (Allen, Daves, and Copeland) reported that the possibility of parole was discussed during the sentencing deliberations. Daves reported that the jurors had discussed the fact that Williams "would be out in 33 years" if he received a life sentence. Allen stated that all the jurors were concerned about the possibility of parole. Allen understood a life sentence to be 33 years and not until death. Copeland stated that several of the jurors were concerned about parole eligibility if Williams received a life sentence and Copeland believed that Williams would be released on parole.

4. Two jurors (Pipton and Allen) knew the jury forewoman, Bonnie Stinnett, as Bonnie Meinhard. Allen stated that Stinnett was the ex-wife of Claude Meinhard, now the Sheriff of Cumberland County. Allen stated that there had been discussions among the jurors concerning their surprise that Stinnett had been allowed to serve on the jury.

Further, this affiant sayeth not.

/s/ Doris Pye
DORIS PYE

Subscribed and sworn to before me on this 18th

day of November, 1996.

/s/ Ronald Illegible
NOTARY PUBLIC
My commission expires: 9/30/2000

EXHIBIT D

Goochland-Powhatan Community Services Board
P. O. Box 485
Powhatan, VA 23139
(804) 598-2200

PSYCHIATRIC EVALUATION

Client: Mr. Jeffrey Cruse

Birth Date: 12-22-67

Evaluation Date: September 14, 1993

Consulting Psychiatrist: Mario Gomez, M.D.

CHIEF COMPLAINT:

"I can't stop having nightmares and crying."

HISTORY OF PRESENTING ILLNESS:

This is a 25 year old white male, currently an inmate at the Powhatan Correctional Center, following an event in which he participated in capital murder of a couple nearby. The patient has little recollection of the event, other than vague memories, as he was intoxicated with alcohol and marijuana at the time. He reports having done LSD two months prior in large amounts, "up to 12 hits at a time", and had been doing so for the past 10 months prior to that. Patient reports he was with another individual who had a record of having murdered people. The patient felt unable to say "no" to his partner's request to rob the couple and subsequently kill them. The patient has recurrent nightmares and visualizes the face of the woman that he killed. When attempting to describe this nightmare, he breaks openly into tears and his face

reddens. He states this has been happening approximately since one week after the murder in late February, 1993, for the next 6 months up through today.

The patient was previously evaluated at a Manassas County Correctional Facility by a psychiatrist who wanted to prescribe an antidepressant, but due to his transfer, he was not prescribed anything. He continues to feel worthless as a person, placated by the guards for what he's done, bringing him into helplessness, tears and anger. He has no hope for his future and has been thinking of suicide constantly. He says there are methods such as cutting on himself. He states he has cut on himself in the past and has taken overdoses as well. He describes having feelings as if there are tingling sensations at times but no overt panic attacks, derealization or depersonalization experiences. He does describe inability to sleep, often tossing and turning, waking up, and feeling fatigued during the day.

The patient can read and write but has problems concentrating on what he reads. He has been having "a lot of anger" in his mind as he is constantly reminded of what he has done by his incarcerators. He is currently awaiting trial.

PAST PSYCHIATRIC HISTORY:

Unavailable. The patient does admit he has had severe substance abuse problems, becoming intoxicated, high on pot and LSD, dating back to his grade school years. He states he always experienced low self-esteem from being "picked on". Any letters to his counselor states that he would never hit back others that provoked him for fear of

"harming them". He admits to hallucinations during the day, as if he was "tripping" again, describing post-hallucinogen perceptive problems. He is currently not experiencing any withdrawal phenomena but states that liquor is available in the jail.

PAST MEDICAL HISTORY:

Significant for episode of hypertension in epistaxis in 1987. Has not had reoccurrence since then.

FAMILY HISTORY:

Significant for alcoholism in his older brother, who is 35 years old, as well as in his father. Apparently, his father left when the patient was age 5, and he died approximately 2 years ago from problems with alcoholism and COBD from heavy smoking.

SOCIAL HISTORY:

The patient quit school in the 9th grade. He stated he missed most of 8th grade, as he was truant and would not pay attention in class. He seemed disinterested at the time and because he felt picked on by others and would often abuse drugs instead. He is able to read and write. He was not maintained in any learning disabled classes. He was not psychologically tested for any concurrent psychiatric disorder. He says he has a girlfriend who bore him his third child, a boy, approximately two months ago, but she has not talked to him since approximately six weeks ago, further exaggerating his depression. He is currently incarcerated, as stated above.

MENTAL STATUS EXAMINATION:

Examination revealed a white male who appeared to have flat affect, low monotone speech, and was wearing prison clothing and shackles. He did not display impulsivity. He cried often and reddened his eye features during the interview, especially during topics in which he discussed the nightmares, as well as current treatment while in jail. This apparently is brought on by embarrassment. He stated he felt he might be killed if he did not follow through his partner in crime's instructions to kill the couple. He stated he always had problems saying "no" and described even allowing others to cut on him simply upon their request. He described neurovegetative symptoms of major depression and post-traumatic nightmares, recurrent in nature, of the event. He described visual misperceptions and he often hears his name being called. He denies current withdrawal symptoms.

Cognitively, he was able to recall recent and remote events well, except for black-outs when he is drinking excessively or doing LSD, in the past two years. He is able to recall three out of three objects after four minutes. He can recite serial 7's backwards with only one mistake, however, slowly. Serial 3's in the same manner. He misspelled "world" in reverse. He is able to recall the presidents back to Regan [sic]. His digit span is impaired with 5 digits forwards, 2 digits backwards. He is able to interpret most proverbs abstractly and can perform calculations rather well. He has poor insight and poor judgement.

INITIAL IMPRESSION:

Axis I	Post-Traumatic Stress Disorder with Depression R/O Attention Deficity/Hyperactivity Disorder, Adult Type Polysubstance Abuse (LSD, Cannabis, Alcohol, etc.) Probable Post-Hallucinogen Perceptive Disorder Probable Post-Hallucinogen Perceptive Disorder (Flashbacks)
Axis II	Antisocial Character Disorder
Axis III	History of Hypertension and Epistaxis in 1987
Axis IV	Severe
Axis V	GAF: 40 – 50

PLAN:

The patient will be started on Imipramine 50mg at night for 5 days, increased to 100mg at night thereafter. Start Chlorpromazie 25mg twice daily, and 50 mg at night. Will see him again in two weeks. Clinic to be contacted if patient develops dystonia, etc. Side effect profile explained to the patient and he welcomes relief of symptoms.

Mario Gomez, M.D.

MG/de

JAMES R. ENNIS
COMMONWEALTH'S ATTORNEY
PRINCE EDWARD COUNTY
ONE MILL STREET
FARMVILLE, VIRGINIA 23901

REPLY TO
P. O. BOX 266

PHONE (804) 392-1902
FAX (804) 392-7297

March 25, 1994

Don Blessing, Esquire
215 N. Main Street
P.O. Box 860
Farmville, VA 23901

RE: Jeffrey Cruse

Dear Don:

As you are fully aware by virtue of your representation of Mr. Cruse, Mr. Cruse was helpful to me in my prosecution of Michael Williams in Prince Edward County. His testimony at the preliminary hearing and his willingness to testify at the trial of these cases was certainly beneficial to my prosecutorial efforts. His cooperation with authorities in Cumberland County was critical to the eventual capture and prosecution of Michael Williams.

Should you feel that it would be of any benefit to your client, I would be willing to appear as a witness at the sentencing phase of his case and give testimony concerning his efforts and cooperation in regard to the charges against Michael Williams and the valuable assistance he rendered to the Commonwealth.

Very truly yours,

/s/ James R. Ennis
James R. Ennis

JRE/shp

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

[Caption Omitted In Printing]

AFFIDAVIT

1. I am Donald C. Blessing. I am a lawyer licensed to practice in the Commonwealth of Virginia. Together with Lee Harrison, I represented Jeffrey Cruse on his charges of capital murder and other related felonies in Cumberland County.

2. Jeffrey Cruse's co-defendant was Michael Wayne Williams. During Williams' state habeas corpus proceedings, I submitted an affidavit in which I stated: "At the time of Williams' trial, Cruse had no plea agreement with Commonwealth. Cruse testified truthfully at [Williams'] trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence." This statement was true then, and it is true now.

3. On March 5, 1997, I was contacted by Williams' federal habeas counsel, Mr. James Moore. Mr. Moore later faxed to me a draft of an affidavit for my consideration. A copy of the draft is attached. Upon reading the draft, I telephoned Mr. Moore and informed him unequivocally that paragraph 5 of the draft affidavit was not true and that, during my earlier conversation with Mr. Moore. I never had told him that Cruse had "an understanding with the Commonwealth." I refused to sign the draft affidavit because the assertion made in paragraph 5 of the draft affidavit is not true.

4. I have been informed that on March 10, 1997, Williams' filed a document in federal district court which on page 32 states. "But in discussions by current counsel for Williams with Cruse's counsel about additional affidavits, Cruse's counsel has not completely refuted the possibility that some inducement from the Commonwealth existed." If this statement is intended to be a reference to the contact between myself and Mr. James Moore described above, the statement is untrue.

5. At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth. At no time have I ever said or implied to Williams' habeas counsel, or to anyone else, that there was an informal agreement or understanding between Cruse and the Commonwealth.

/s/ Donald C. Blessing
Donald C. Blessing

Subscribed and sworn to before me by Donald C. Blessing this 11th day of March, 1997.

/s/ Sharon G. Palmore
Notary Public

My commission expires: October 31, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner, Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center.

Respondent.

AFFIDAVIT OF
DONALD C. BLESSING

Donald C. Blessing, having been first sworn upon oath, states as follows:

1. I am a lawyer, licensed to practice in the Commonwealth of Virginia. My law office is located in Farmville, Virginia.

2. I was appointed to represent Jeffrey Cruse on his capital murder and other related felony charges in Cumberland County arising from the February 27, 1993 murders of Morris C. Keller, Jr. and Mary Elizabeth Keller. Lee R. Harrison, Esquire, of Cartersville, Virginia, had already been appointed to represent Cruse when I was appointed. Mr. Harrison and I were co-counsel for Jeffrey Cruse. Prior to being represented by Mr. Harrison and me, Cruse was represented by James C. Baber.

3. Before Mr. Harrison and I entered the case, Cruse and Mr. Baber had reached a written plea agreement with the Commonwealth's Attorney, whereby Cruse would

have avoided a death sentence. This written plea agreement was revoked by the Commonwealth because Cruse breached the agreement by not telling the complete truth about the offenses.

4. As I have stated in a prior Affidavit dated February 7, 1996, at the time Cruse testified at the January 1994 capital murder trial of Michael Wayne Williams in Cumberland County, Cruse had no formal plea agreement with the Commonwealth.

5. At the time Cruse testified at Williams' trial, Cruse did have an understanding with the Commonwealth that if he cooperated with the Commonwealth in preparation for Williams' trial and testified against Williams, his cooperation and testimony might help him with the capital murder charges and other felony charges he was facing in Cumberland County.

/s/ _____
Donald C. Blessing

COMMONWEALTH OF VIRGINIA,

CITY/COUNTY OF _____, to-wit:

Subscribed and sworn to before me this ___ day of March 1997.

My Commission expires: _____

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center,

Respondent.

MOTION FOR LEAVE TO INVOKE DISCOVERY

The petitioner, Michael Wayne Williams ("Williams"), by counsel, pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases, respectfully moves this Court for entry of an order directing the Clerk to issue subpoenas *duces tecum* for the production of documents that are pertinent to certain factual issues raised in Williams' Petition.

Williams' Petition asserts that the Commonwealth failed to disclose that there was a plea agreement, understanding, arrangement or expectation between the Commonwealth and Jeffrey Allan Cruse, the chief prosecution witness. Petition, Claim IV.A.1, at 86. The Commonwealth admits that at one time a plea agreement existed, but denies that such an agreement existed at the time of Cruse's testimony against Williams. Respondent's Answer, at 30-31. In Williams' state habeas proceeding, a motion for discovery relating to this issue was summarily denied. Williams therefore has not had the opportunity to discover documents in the files of the Commonwealth's

representatives who were responsible for prosecuting the criminal charges against Cruse and Williams or documents in the files of Cruse's defense counsel which are relevant to this issue.

Rule 6(a) vests this Court with discretion to authorize discovery in habeas cases "for good cause shown". Federal courts considering discovery motions in habeas cases have applied the standard established in *Harris v. Nelson*, 394 U.S. 286 (1969), even though *Harris* predates enactment of Rule 6, governing discovery in habeas cases. *See, e.g., Gilday v. Callahan*, 99 F.R.D. (D. Mass. 1983) (citing *Harris* as the standard for considering discovery motions in habeas cases).

Harris articulates the standard for establishing "good cause" to support discovery in habeas cases as follows:

> We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. 394 U.S. at 300.

Williams has demonstrated reason to believe that full discovery of the relevant facts could result in proof of a claim entitling him to relief. Petition, Claim IV.A.I., at 86.

The Commonwealth relies upon the affidavit of one of the Commonwealth's Attorneys involved in prosecuting the Williams and Cruse cases and the affidavit of one of Cruse's defense counsel, which affidavits assert in summary fashion the absence of any agreement between Cruse and the Commonwealth. The affidavits do not address the possible existence of promises, inducements, expectations or understandings which may have affected Cruse's testimony. Nevertheless, the record clearly suggests the existence of inducements or understandings between the Commonwealth and Cruse regarding Cruse's sentence for the Keller murders. *Id.* Williams has therefore shown a reasonable basis to believe that full discovery of this issue could result in his proof of a claim entitling him to relief.

For these reasons, Williams respectfully requests that this Court enter an order permitting discovery of the relevant documentary evidence by means of subpoenas *duces tecum* as set forth specifically in the Statement of Documents to be Produced.

MICHAEL WAYNE WILLIAMS

By: /s/ Illegible
Counsel

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, Virginia 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
Hill B. Wellford, III, VSB #38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4127

Virginia Capital Representation
Resource Center
1001 East Main Street, 5th Floor
Post Office Box 506
Richmond, Virginia 23204-0506
(804) 643-6845

April 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE
WILLIAMS,

Petitioner,

v.

Civil No. 3:96-CV-529

J.D. NETHERLAND,
Warden, Mecklenburg
Correctional Center,

Respondent.

STATEMENT OF DOCUMENTS TO BE PRODUCED

1. All documents, audio tapes, video tapes, or recordings, of any description, reflecting or relating to any agreement, understanding, promise, inducement, expectation, consideration, benefit, or payment offered to or for the benefit of Jeffrey Alan Cruse in connection with the investigation, trial or post-conviction proceedings against Michael Wayne Williams or Cruse relating to the deaths of Morris C. Keller and Mary Elizabeth Keller.

2. All documents, audio tapes video tapes, or recordings, of any description, reflecting or relating to communications between representatives of the Commonwealth of Virginia and Jeffrey Alan Cruse or communications between representatives of the Commonwealth and any of Cruse's lawyers, in connection with the investigation, trial or post-conviction proceedings against Cruse or Michael Wayne Williams relating to the deaths of Morris C. Keller and Mary Elizabeth Keller.

3. Any oral statements, whether or not reduced to writing, reflecting or relating to any agreement, understanding, promise, inducement, expectation, consideration, benefit, or payment by the Commonwealth of Virginia offered to or for the benefit of Jeffrey Alan Cruse in connection with the investigation, trial or post-conviction proceedings against Michael Wayne Williams or Cruse relating to the deaths of Morris C. Keller and Mary Elizabeth Keller.

MICHAEL WAYNE WILLIAMS

By: /s/ Illegible
Counsel

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, Virginia 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
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909 East Main Street, Suite 1200
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Resource Center
1001 East Main Street, 5th Floor
Post Office Box 506
Richmond, Virginia 23204-0506
(804) 643-6845

April 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE
WILLIAMS,

Petitioner,

v. Civil No. 3:96-CV-529

J.D. NETHERLAND,
Warden, Mecklenburg
Correctional Center,

Respondent.

REQUEST FOR SUBPOENAS DUCES TECUM

Pursuant to Petitioner's Motion for Leave to Invoke Discovery and the attached Statement of Documents to be Produced, the petitioner hereby requests that the Court direct the Clerk to issue subpoenas *duces tecum* to each of the persons listed below, requiring that such persons produce all documents described in the Statement of Documents to be Produced within 14 days of service, at the offices of James E. Moore, Esquire. Christian & Barton, L.L.P., 909 East Main Street, Suite 1200, Richmond, Virginia 23219.

The following persons may have custody of documents responsive to petitioner's discovery request:

Donald C. Blessing, Esquire
215 North Main Street
Farmville, Virginia 23901

Lee R. Harrison, Esquire
2309 Cartersville Road
Cartersville, Virginia 23027

Warren B. Von Schuch, Esquire
Assistant Commonwealth's Attorney
Office of the Commonwealth's Attorney
Chesterfield County
9500 Courthouse Road
Chesterfield, Virginia 23832

Patricia D. Scales, Esquire
Commonwealth's Attorney
Cumberland County
Route 60
Cumberland Courthouse Circle
Cumberland, Virginia 23040

James R. Ennis, Esquire
Commonwealth's Attorney
Prince Edward County
One Mill Street
Farmville, Virginia 23901

Gene A. Southall
Sheriff – Prince Edward County
North Main Street
Post Office Box 25
Farmville, Virginia 23901

Claude Meinhard
Sheriff – Cumberland County
Route 60
Post Office Box 71
Cumberland, Virginia 23040

MICHAEL WAYNE WILLIAMS

By: /s/ Illegible
Counsel

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, Virginia 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
Hill B. Wellford, III, VSB #38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4127

Virginia Capital Representation
Resource Center
1001 East Main Street, 5th Floor
Post Office Box 506
Richmond, Virginia 23204-0506
(804) 643-6845

April 29, 1997

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

MICHAEL WAYNE WILLIAMS,

Petitioner,

v. Civil Action No. 3:96CV529

J.D. NETHERLAND, WARDEN,

Respondent.

PETITIONER'S REPLY TO OPPOSITION
TO MOTION FOR LEAVE TO INVOKE DISCOVERY

Petitioner, Michael Wayne Williams, by counsel, submits this reply in support of his motion for leave to invoke discovery, and says:

1. Petitioner, pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases, has sought leave to invoke discovery regarding Claim IV(A)(1). In that claim,[1] petitioner alleged, in part, that the Commonwealth failed to reveal its agreement and/or understanding concerning sentence with the cooperating co-defendant, Jeffrey Cruse. Cruse testified at Williams' trial that Cruse had fired one fatal shot at Mrs. Keller and Williams had fired the remaining five shots at Mr. and Mrs. Keller. Although

[1] Respondent concedes that the claim concerning failure to reveal an agreement with Cruse is not defaulted. Oppos. at 3, para. 5. Petitioner has previously addressed respondent's arguments concerning default of other aspects of the claim, Response to Motion to Dismiss filed 2/3/97, and relies on those arguments here. However, the issue need not be resolved at this time.

Cruse testified under oath to facts constituting capital murder, he maintained that he had no agreement, promise, or understanding with the Commonwealth concerning his sentence.

2. During state habeas proceedings, Williams sought discovery on this claim with no success. State habeas counsel Eric White wrote both the Commonwealth's Attorney who tried the case and Respondent's counsel on October 30, 1995, and specifically requested information on consideration or promises of consideration given to any witness, including Cruse. Attachment A at p. 3, para. 4, and at p. 4 (last paragraph). Mr. White also requested permission to review the investigative files of the Cumberland County Sheriff's Office and the Prince Edward County Sheriff's Office[2]. Attachments B1 and B2. On November 1, 1995, Respondent's counsel answered Mr. White and stated that he would not review the Commonwealth's materials for exculpatory or impeachment material as requested. "I know of no authority that requires the Commonwealth, as the respondent in a civil habeas proceeding, to comply with such a request from petitioner's counsel." Attachment C at 1, para. 3.

[2] The Prince Edward files are relevant because Cruse's testimony connected a gun used in the Cumberland County murders to that used in the Prince Edward murders. Thus, Cruse assisted the Prince Edward prosecution against Williams and may have been promised support or consideration at the time of his sentencing in return. In fact, prior to Cruse's sentencing the Prince Edward Commonwealth's Attorney offered his assistance to Cruse's attorney. See Attachment G. Evidence of the Prince Edward murders was admitted at the sentencing phase of Williams' Cumberland County trial.

3. On December 1, 1995, Mr. White wrote to Respondent's counsel and advised that he wished to speak with Mr. Cruse. However, Mr. Cruse was incarcerated in protective custody at an unknown location. Mr. White asked Respondent to disclose Mr. Cruse's location so Mr. White could interview him. Attachment D. By letter dated December 11, 1995, Respondent refused to do so.[3] Attachment E. On January 10, 1996, Mr. White filed a motion with the Virginia Supreme Court seeking production of Mr. Cruse "at a location to be chosen by the Commonwealth." In that motion, Mr. White stated:

> The files of trial counsel as well as the record in this case do not adequately reflect information or discovery relating to plea agreements between the Commonwealth and Jeffrey Alan Cruse. Accordingly, counsel must talk to Mr. Cruse and obtain records relating to his incarceration.

Respondent's Attachment 5 at para. 7. Mr. White sought production of all "documentation relating to the incarceration of Jeffrey Cruse since his first incarceration on charges of capital murder in Cumberland County." *Id.* On January 16, 1996, Respondent filed his Opposition to the discovery motion which he described as seeking information from Cruse about "the possible existence of plea agreements" as well as documentation relating to Cruse's incarceration for the Keller murders. Attachment F at para. 2. Respondent argued that Williams had no right to discovery in state habeas. Williams' motions were denied

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[3] Respondent continues to conceal Cruse's location despite the fact that Williams is incarcerated at Mecklenburg on death row and not a threat to Cruse.

by the Virginia Supreme Court on the same date his state habeas petition was dismissed.[4]

4. Obviously Williams sought a variety of evidence in support of his *Brady* claim in state habeas, as well as a hearing, but was denied access to the relevant information and parties. As Williams was not granted a hearing on the issue, he had no opportunity for court ordered prehearing discovery and no opportunity to present and develop his claim at a hearing. Thus, Respondent's argument that Williams failed to pursue relevant facts in state collateral proceedings is not supported by the facts or by the cases relied upon by Respondent. *See opposition* at 5, 8. Respondent relies on cases where the petitioner had been provided a hearing at the state level or where the petitioner had failed to seek the relevant information. Such is not the case here. Contrary to respondent's assertions, Williams is not bound by the prior state record where he had no opportunity to develop his claim. Without court ordered discovery, Williams was simply unable to obtain the evidence required to prove this claim. The Commonwealth has opposed all his prior efforts and continues to do so here. The existence of the Commonwealth's "deal" with Cruse has been an issue at trial, in state habeas, and now in this proceeding. His Rule 6 motion should be granted.

5. Williams request is not premature. The evidence he seeks will assist this Court when determining whether

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[4] Current counsel is unaware of any capital case in which the Virginia Supreme Court has granted discovery, a hearing, or expert assistance since obtaining exclusive jurisdiction of capital state habeas petitions on July 1, 1995.

a hearing should be granted on the issue. Such a procedure has the approval of the United States Supreme Court. *See Blackledge v. Allison*, 431 U.S. 63, 81 (1977) (approving Rule 6 discovery prior to the grant to a hearing to determine whether a factual basis for claim exists); *Herrera v. Collins*, 113 S. Ct. 853, 883 (1993) (Blackmun, J., dissenting on other grounds) (discovery warranted "when[ever] it would help the court make a reliable determination with respect to the petitioner's claim."). Discovery is clearly appropriate here. A reading of the trial record, as set forth in Williams' Claim IV(A)(1), common sense and some minimal experience in criminal prosecutions, supports the conclusion that Cruse had an understanding or agreement with the Commonwealth regarding his testimony and sentence.

6. Nor must Williams meet the two part test under Section 2254(e), as Respondent argues (Oppos. at 7-8), for that test applies only where the petitioner has been provided with the opportunity to develop the relevant facts in a state court proceedings. *See Love v. Morton*, ___ F.3d ___, 1997 WL 220329 at *5 (3d Cir. May 5, 1997). No such opportunity was provided to Williams. Moreover, when arguing that 2254(e) applies, Respondent misstates Williams' testimony. Respondent states that Williams "admitted under oath that he fired the first shot that killed Mr. Keller." Oppos. at 8, para. 15. However, Williams testified that he fired one shot at Mr. Keller and after that shot Mr. Keller stood up. According to Williams, Cruse fired all the remaining shots at Mr. and Mrs. Keller. Tr. 176-77 (1-5-94). As set forth in Williams' petition and as argued at trial, the first shot to Mr. Keller was not fatal, and Williams never testified that he fired a fatal shot.

7. Without discovery, Williams has been unable to match Respondent's resources in his efforts to develop this claim. It cannot be expected that the Commonwealth would voluntarily produce critical, relevant documents or that witnesses voluntarily would admit misconduct upon mere inquiry by Williams' counsel. Only court ordered discovery can begin to provide a level playing field in the development of this claim.

8. Thus, Williams has demonstrated good cause as required under Rule 6 and his request is timely. For the reasons set forth in his original motion and herein, his motion for discovery should be granted.

Respectfully submitted,

MICHAEL WAYNE WILLIAMS

By: /s/ Barbara L. Hartung

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, VA 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
Hill B. Wellford, III, VSB #38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, VA 23219-3095
(804) 697-4127

Virginia Capital Representation
Resource Center
1001 East Main Street, 5th
P.O. Box 506
Richmond, VA 23204-0506
(804) 643-6845

May 14, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,	)	
Petitioner,	)	Civil Action No. 3:96cv529
v.	)	
J.D. NETHERLAND, Warden,	)	
Respondent.	)	

ORDER

(Filed Jul. 16, 1997)

This matter is before the Court on petitioner's motion for subpoenas *duces tecum* for the production of documents concerning Claim IV.A.1 of his petition for habeas corpus. The Court finds that petitioner has not demonstrated good cause for this discovery request. Accordingly, deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that petitioner's motion is DENIED.

Let the Clerk send copies of this Order to Counsel of record.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

July 16, 1997
DATE

RECEIVED
AUG 0 5 1997
Virginia Interstate
Corrections Compact

055

Mr. Jeffery A. Cru-
~~Powhatan Reception~~
~~State Farm, Virginia~~

Please forward to
ACI-West.

inmate!
Thanks,
Bobby Kaplan

July 29, 1997

Mr. Jeffrey A. Cruse #215584
Powhatan Reception & Classification Center
State Farm, Virginia 23160

Dear Mr. Cruse:

I am a mitigation investigator who is assigned to work on the Michael Williams case. I would like to talk about his case with you. I was told that at the onset of this capital case you believed Mr. Williams had threaten [sic] your life. I have talked with Mr. Williams on several occasions concerning this, and have directly asked him about these threats. He stated that he did make some statements. At that time he was just angry, he didn't mean them. Mr. Williams has assured me that he has no intentions or desires to cause you any harm now or ever.

There are some areas in his case that I would like to talk to you about.

If you have any questions, call me collect at 804-643-6845, if for some reason I am not in my office, please leave me a message on my voice mail. I will be waiting to hear from you.

Thank you,
/s/ Alfred C. Brown
Alfred C. Brown

[Address Omitted In Printing]

[Business Card Enclosed In Letter]

[LOGO]
Alfred C. Brown
Chief Mitigation Specialist

Virginia Capital Representation Resource Center
The Heritage Building
1001 East Main Street, P.O. Box 506,
Richmond, Virginia 23204-0506

(804) 643-0197
FAX: (804) 643-6819

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

Civil Action
No. 3:96CV529

J.D. NETHERLAND, Warden,

Respondent.

SECOND MOTION FOR
LEAVE TO INVOKE DISCOVERY

(Filed Jul. 31, 1997)

The petitioner, Michael Wayne Williams ("Williams"), by counsel pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases, respectfully moves this Court for an Order directing Respondent to disclose to counsel for Williams the present location of Jeffrey Allan Cruse and history of his incarceration. Cruse was a participant in the capital murders of the Kellers, for which Williams was convicted and sentenced to death, and he testified for the Commonwealth at Williams' trial.

Cruse was convicted and sentenced for his part in the Keller murders and is incarcerated at an unknown location out of state. During state habeas proceedings, counsel for Williams moved the Virginia Supreme Court for disclosure of Cruse's location or, in the alternative, for the production of Cruse at a location selected by the Commonwealth so counsel could interview Cruse, and

for records of his incarceration. Attachment A. Respondent opposed the motion. The motion was denied by the Virginia Supreme Court. Attachment B. During the preparation of Williams' federal petition, additional, unsuccessful efforts were made to determine where Cruse was incarcerated. The information requested is essential to the full development and presentation of Williams' claims to this Court.

In Claim II(A) of his federal petition Williams asserted that the evidence was insufficient to establish his guilt because he and Cruse had given conflicting testimony as to who fired multiple fatal shots at Mr. and Mrs. Keller. Both Williams and Cruse each admitted firing one shot. Cruse admitted shooting Mrs. Keller once in the head. Williams contended that he fired a single shot at Mr. Keller, who fell to the ground but then stood up, and that this shot was not fatal. Respondent credits Cruse's testimony that Williams then fired additional shots that killed the Kellers. Resp. Motion to Dismiss at 22-23. No independent evidence corroborated Cruse's account.

Williams also asserted in Claim IV(A)(2) that the Commonwealth failed to disclose *Brady* material contained in a psychiatric report on Cruse. In September 1993, while incarcerated for the Keller murders prior to Williams' trial, Cruse was evaluated by a psychiatrist affiliated with the Goochland-Powhatan Community Services Board. A report of that interview states "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time. He reports having done LSD two months prior in large amounts, 'up to 12 hits at a time', and had been doing so for the past 10 months prior to

that." Attachment C. In contrast, at Williams' trial in January 1994, Cruse testified in great detail about the events leading up to the murder of the Kellers and about the shooting of Mr. and Mrs. Keller. Cruse's intoxication and his admitted inability to remember facts surrounding the Keller murders, as revealed in the September report, were obviously *Brady* material that should have been disclosed to Williams' trial counsel. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995), *United States v. Bagley*, 473 U.S. 667 (1985). Respondent has maintained that Cruse's testimony demonstrates Williams' guilt. Resp. Motion to Dismiss at 22-23. Given the discrepancies between Cruse's trial testimony and his account in September 1993, current counsel must interview Cruse about the Keller murders, his trial testimony, and his recollections. Cruse has been convicted and sentenced for his part in the Keller murders, and no longer has a motive to minimize his part in the shootings.

Furthermore, in view of the September 1993 report, it is highly probable that additional interviews were conducted of Cruse both before and after Williams' capital trial that have not yet been disclosed to Williams' counsel. Those interviews may contain further accounts by Cruse that contradict or impeach the testimony he gave at Williams' trial. As Williams' counsel have been unable to determine where Cruse has been incarcerated, counsel cannot specify the probable location and custodians of the relevant documents for the Court. Therefore, counsel also moves this Court for an Order pursuant to Rule 6 (a) directing Respondent to disclose to Williams' counsel each institution where Cruse was incarcerated, along

with the relevant dates, from the date of Cruse's arrest on the Keller homicides up to the present.

Rule 6(a) vests this Court with discretion to authorize discovery in habeas cases "for good cause shown." Federal courts considering discovery motions in habeas cases have applied the standard established in *Harris v. Nelson*, 394 U.S. 286 (1989), even though Harris predates enactment of Rule 6, governing discovery in habeas cases. *See, e.g., Gilday v. Callahan*, 99 F.R.D. (D.Mass. 1983) (citing *Harris* as the standard for considering discovery motions in habeas cases).

Harris articulates the standard for establishing "good cause" to support discovery in habeas cases as follows:

> [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. 394 U.S. at 300. The Supreme Court reaffirmed *Harris* just this term in *Bracy v. Gramley*, ___ U.S. ___, 1997 WL 303400 (June 9, 1997), and concluded that the petitioner had made a sufficient showing to permit discovery on a claim of judicial bias. Thus in *Bracy*, the petitioner was granted the means to develop new evidence in support of his claim in federal court. Williams seeks to do the same here. In addition, discovery is available upon a showing of good cause "regardless of whether there is to be an evidentiary hearing." *Jones v. Wood*, ___F.3d___, 1997 WL 312584, (9th Cir. June 12, 1997).

Williams has demonstrated reason to believe that full discovery of the relevant facts may support his *Brady* claim and demonstrate that he is entitled to relief. Cruse's testimony was essential to Williams' conviction, and any suppression of *Brady* material relevant to Cruse's testimony would be highly prejudicial and grounds for relief. Further discovery and investigation may establish Williams' innocence of one or more of his capital convictions.

For these reasons, Williams respectfully requests that this Court enter an Order granting Williams discovery of Cruse's current location and granting discovery of each prior place of incarceration, along with the relevant dates, from the date of Cruse's arrest on the Keller homicides up to the present.

MICHAEL WAYNE WILLIAMS
By: /s/ Barbara L. Hartung
Counsel

Barbara L. Hartung, VSB 38062
1001 East Main Street, Suite 504
Richmond, VA 23219
(804) 649-1088

James E. Moore, VSB 14526
Theodore Adams, III, VSB 26708
Hill B. Wellford, III, VSB 38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
(804) 697-4127

Virginia Capital Representation
Resource Center
1001 East Main Street
P.O. Box 506
Richmond, VA 23204-0506
(804) 643-6845

July 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS, Petitioner,	)	Civil Action No. 3:96CV529
v.	)	
J.D. NETHERLAND, WARDEN, Respondent.	)	

ORDER

For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED AND ORDERED that all claims asserted in the Petition, except Claims I(A), IV(A)(1), and IV(A)(5) be and the same are hereby **DISMISSED**.

An evidentiary hearing on Claims I(A), IV(A)(1) and IV(A)(5) will be conducted commencing at **8:30 a.m. Monday, May 18, 1998**.

Counsel for each of the parties herein shall, by **1:00 p.m., May 13, 1998**, file with the Clerk of this Court proposed findings of fact and conclusions of law.

Let the Clerk send copies of the Memorandum and this Order to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date APR 13 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Caption Omitted In Printing]

Civil Action No. 3:96CV529

MEMORANDUM OPINION

This matter is before the Court on the motion of Respondent J.D. Netherland, Warden of Mecklenberg Prison, to dismiss Petitioner Michael Wayne Williams' petition for a writ of habeas corpus for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The matter has been fully briefed by the parties and is ripe for decision. For the reasons which follow, the Court will GRANT IN PART AND DENY IN PART the motion.

I. FACTUAL BACKGROUND

In affirming Williams' conviction and sentence on direct appeal, the Virginia Supreme Court stated the facts of the case as follows:

> Between 9:30 and 10:30 p.m., on Saturday, February 27, 1993, Verena Lozano James drove Williams and Cruse to a rural area in Cumberland County and left them approximately one-half mile from Bear Creek Market. Williams and Cruse planned to rob persons in the market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.
>
> The two men walked to the store, but found it closed. Williams suggested that "he knew a house where we can go; they'd have a couple thousand dollars." Cruse agreed, and they

walked some distance to the Kellers' house. Upon arrival at the Kellers' house, Cruse returned the Black Hawk revolver to Williams and Cruse knocked on the door. When Mr. Keller opened the door, Williams pointed the gun at him and both men entered the house.

Williams ordered the Kellers to remove all their clothes, and he remained in the kitchen with them while Cruse began searching the house for money and other valuables. After Cruse found a fully loaded .38 caliber handgun, Williams decided "to tie [the Kellers] up," and Cruse did so. The Kellers were then placed, first in one closet and later in separate closets, and both men resumed their search.

After the two men had assembled some of the Kellers' property in the living room, at Williams's suggestion, first Williams, then Cruse, raped Mrs. Keller. Afterward, Williams ordered both Kellers to take showers and put on clean clothes, which they did. Williams then directed the Kellers to "take a walk" with them. Upon hearing that the two men planned to burn the house, Mrs. Keller took the Kellers' marriage certificate with her. As the Kellers, Williams, and Cruse left the house and walked "[d]own on a dirt road and into a thicket," Williams was carrying the .38 caliber handgun and Cruse was carrying the Black Hawk revolver.

When they were in the thicket with Williams standing behind Mr. Keller and Cruse standing behind Mrs. Keller, Williams said, "We'll shoot at the count of three." Upon Williams's count of three, he shot Mr. Keller with the .38 caliber handgun and Mr. Keller fell to the

ground. However, Cruse did not shoot Mrs. Keller. Williams told Cruse to shoot Mrs. Keller because "he didn't want to leave no witnesses." Cruse then shot Mrs. Keller once with the Black Hawk revolver. After Mrs. Keller fell, Mr. Keller stood up and Williams shot him again with the .38 caliber handgun. As Cruse started to walk away, Williams said, "Wait . . . [w]hat if they ain't dead?", and he shot each of the Kellers "a couple more times apiece" with the .38 caliber handgun.

The two men returned to the house, where they loaded a television set, microwave oven, shotgun, stereo set, and speakers into Mr. Keller's jeep, and, at Williams's suggestion, set fire to the house. Williams and Cruse then took the jeep to Fredericksburg, where they sold some of the stolen property the next day. They then threw the remaining stolen property and the Black Hawk revolver into the Rappahannock River and set fire to the jeep.

Upon hearing of the Keller fire on Monday morning, Verena James advised the police that she had taken Williams and Cruse to an area not far from the Keller house on the night of the fire. Consequently, the police sought to question the two men regarding the fire. Williams and Cruse had returned to Cumberland County the Monday following the murders and the police were able to question Cruse. Williams, however, fled to Florida.

At first, Cruse furnished no information of value to the police. However, after the police discovered the bodies of the Kellers on Tuesday, Cruse consulted counsel. His counsel obtained a conditional agreement from the Commonwealth

that it would not seek the death penalty provided Cruse gave a truthful statement of his knowledge of the crimes. Cruse then furnished information that implicated both men in all of the crimes charged, except for Cruse's role in Mrs. Keller's rape. Because Cruse breached his agreement in failing to tell the police that he had raped Mrs. Keller, the Commonwealth also indicted him for the Kellers' capital murders.

Testifying in his own defense, Williams agreed with Cruse: (1) that Williams was the one who suggested robbing persons at the store; (2) that Williams was the first one to shoot Mr. Keller and that Cruse was the first one to shoot Mrs. Keller; and (3) that it was Williams's idea to burn the Keller house. However, Williams (1) denied that he raped Mrs. Keller, (2) claimed that Cruse fired all the subsequent shots into the Kellers' bodies, and (3) contradicted other details of Cruse's testimony about who had suggested some of their activities during and after the murders.

Lisa C. Schiermeier, a serologist, tested the seminal fluid recovered from Mrs. Keller's vagina as a part of the Physical Evidence Recovery Kit prepared by Dr. Deborah Kay, an assistant chief medical examiner who performed the autopsy on Mrs. Keller. Schiermeier compared that sample with the blood types of Cruse, Williams, and Mr. Keller. Schiermeier testified that her comparison indicated only Williams could have contributed a certain type of seminal fluid found in the sample. Dr. George C. Li, a DNA expert who performed a DNA test on the spermatozoa from the sample, testified that his test results were consistent with a conclusion that

Cruse and Williams jointly contributed the seminal fluid.

Williams v. Commonwealth, 248 Va. 528, 533-35 (Va. 1994).

II. PROCEDURAL HISTORY

On June 29, 1993, in the Circuit Court of Cumberland County, Virginia, Michael Wayne Williams ("Williams") was charged in twelve separate indictments for the capital murder, robbery, rape, and abduction of Mary Keller; for the capital murder, robbery, and abduction of Morris Keller; for capital murder based on two related homicides; for statutory burglary; and for arson. Jeffrey Allan Cruse ("Cruse") was also indicted for the same offenses. Several months earlier, Williams was arrested and indicted on four homicides which had occurred in Prince Edward County on December 24, 1992. Williams pled not guilty to each of the charges.

Williams was subsequently tried by a jury which found him guilty on all counts. On the non-capital charges, the jury fixed Williams' punishment at life imprisonment for the rape, 50 years and a $100,000 fine for the arson, 40 years for each of the robberies, 20 years for the burglary, and 10 years for each of the abductions. On January 7, 1994, the jury recommended that Williams be sentenced to death for the capital murders of both Mr. and Mrs. Keller, finding that both statutory aggravators of "future dangerousness" and "vileness" existed. The trial judge subsequently adopted the jury's recommendation and sentenced Williams to death on February 22, 1994.

On November 4, 1994, the Virginia Supreme Court upheld Williams' capital murder convictions and death sentences in *Williams v. Commonwealth*, 248 Va. 528 (1994). Williams' request for a rehearing was denied on January 13, 1995. On June 26, 1995, the U.S. Supreme Court denied his petition for a writ of certiorari. *See Williams v. Virginia*, 113 S. Ct. 1880 (1995). Williams subsequently filed a petition for a writ of habeas corpus in state post-conviction proceedings.

On August 30, 1995, Williams filed his initial state habeas petition. From December 1995 to January 1996, counsel for Williams also filed motions for expert assistance and discovery. On January 29, 1996, after receiving leave to amend, Williams filed an amended state habeas petition. The Virginia Supreme Court dismissed Williams' petition without hearing or oral argument and denied all motions for expert services and discovery on March 18, 1996. The U.S. Supreme Court again denied certiorari on October 7, 1996. *See Williams v. Netherland*, 117 S. Ct. 200 (1996).

On July 2, 1996, this Court granted Williams' motion for appointment of counsel and stay of execution, then scheduled for July 11, 1996. By Order entered on August 13, 1996, this Court directed Williams to file his federal habeas petition within 180 days of April 24, 1996. The Court subsequently granted Williams' request for a 30-day extension. Williams filed his federal habeas petition on November 20, 1996.

III. CLAIMS PRESENTED

In his federal habeas petition Williams attacks his conviction and sentence on the following grounds:

I. Juror Misconduct Violated Williams' Rights to an Impartial Jury and to Due Process of Law

   A. Juror Stinnett

   B. Juror Blanton

   C. The Jurors Improperly Considered Parole Eligibility During the Sentencing Deliberations

II. The Evidence Was Insufficient as a Matter of Law to Sustain Any Convictions for Capital Murder

   A. The Evidence Did Not Establish that Williams Was the Triggerman

   B. The Predicate Felonies Were Not Part of the Murders

III. The Trial Court Denied Williams a Fair Trial and Sentencing

   A. Guilt Phase

      1. The Trial Court Gave an Erroneous Instruction on Capital Murder and Relieved the Commonwealth of Its Burden to Prove the Elements of Capital Murder

      2. The Trial Court Did Not Properly Perform or Permit a "Life-Qualification" of the Jury

         a. Jurors Trent and Holman

b. Juror Bernard

c. Juror Davis

d. Jury Predisposed to Impose Death

3. The Trial Court Erred When It Refused to Permit In-Depth, Individual Questioning Regarding Pre-Trial Publicity

4. The Trial Court Denied Williams a Fair Trial By Refusing His Request For Appointment of an Investigator

5. A Mistrial Should Have Been Declared After Verena James Referred to the "Rice Fires" During the Guilt Phase of Trial

6. The Trial Court Erred in Allowing the Commonwealth's Attorney to Improperly Bolster the Testimony of Cruse

7. The Trial Court Erred in Admitting Into Evidence Numerous Photographs of the Victims

8. Williams' Constitutional Right to be Present at Trial and to Confront His Witnesses Should Not Have Been the Subject of Impeachmen [sic]

B. Sentencing Phase

1. The Trial Court Erred in Not Declaring a Mistrial or Not Giving Cautionary Instructions After

Improper and Inflammatory Closing Argument by the Commonwealth at the Sentencing Phase

2. Williams Was Not Provided With Appropriate Discovery to Rebut the Commonwealth's Case on Vileness and Future Dangerousness

3. The Court Erred in Denying a Jury Instruction Concerning the Meaning Life Sentence and Williams' Mandatory 30 Year Parole Ineligibility

4. The Trial Court Erred in Permitting the Mother of the Victim to Testify at the Sentencing Phase

5. The Trial Court Erred When Admitting Evidence of Unadjudicated Criminal Acts in the Sentencing Phase of the Trial

6. The Trial Court Erred in Admitting Evidence of Unadjudicated Criminal Conduct Without Setting a Standard of Proof

7. The Trial Court Erred in Admitting Photographs of the Prince Edward Homicides

8. The Trial Court Erred in Permitting Cross-Examination of Williams' Mother That Exceeded the Scope of Direct Examination

9. The Trial Court Erred in Restricting the Testimony of Williams' Mitigation Expert and Barring

Testimony Explicitly Permitted Under the Statute

10. The Trial Court Erred With Instructing the Jury at the Sentencing Phase and in Failing to Instruct on Mitigation and Mitigating Evidence

11. The Trial Court's Sentencing Instructions Were Constitutionally Deficient

IV. Prosecutorial Misconduct Deprived Williams of a Fair Trial and Due Process

A. Guilt Phase

1. The Commonwealth Failed to Disclose Its Agreement With the Chief Prosecution Witness, Cruse, and Actively Misled the Jury Regarding An Agreement With Cruse

2. The Commonwealth Failed to Disclose a Psychiatric Evaluation of Cruse Containing Brady Information

3. The Commonwealth Allowed Cruse, Williams' Co-Defendant, to Misrepresent his Cooperation and Contacts With the Commonwealth Prior to Williams' Trial

4. The Commonwealth Presented Improper Opening and Closing Arguments

5. The Commonwealth Failed to Reveal at Voir Dire That Stinnett's

Former Husband Would be a Trial Witness and That She Had Failed To Reveal Their Relationship to the Court and Counsel

B. Sentencing Phase

1. The Prosecutor Acting Improperly When Objecting to Dr. Cornell's Testimony About Mitigation Factors Properly Before the Jury

2. The Prosecutor Engaged in Improper and Prejudicial Argument During the Sentencing Phase

V. Williams Did Not Receive Effective Assistance of Counsel

A. Guilt Phase

1. Counsel was Ineffective in Failing to Object to Improper Instructions Regarding the Triggerman Rule and the Degrees of Murder

2. Counsel Did Not Effectively Investigate or Confront the Petitioner's Co-Defendant, Jeffrey Alan Cruse, or the Issue of Cruse's Plea Agreement With the Commonwealth

3. Trial Counsel Failed to Investigate, Develop and Present Evidence of Voluntary Intoxication as a Defense and to Impeach the Prosecution's Key Witness

a. Intoxication as a Defense

b. Intoxication to Impeach the Prosecution's Key Witness

4. Counsel was Ineffective in Failing to Object to the Court's Deficient Preliminary Instruction and Jury Charge on the Burden of Proof

5. Petitioner's Counsel Were Ineffective on Voir Dire and Compounded The Trial Court's Error

   a. Counsel Failed to Adequately Protect Williams' Right to Life Qualification Questions

      i. Juror Trent

      ii. Juror Holman

      iii. Juror Bernard

   b. Counsel Failed to Challenge Prospective Juror Stinnett for Cause

   c. Counsel Failed to Conduct Extensive Voir Dire on the Issue of Pretrial Publicity

6. Trial Counsel Were Ineffective in Seeking Court Appointment of an Investigator

7. Counsel was Ineffective in Failing to Promptly Stipulate to the Testimony of Family Members Regarding Identification and Ownership of Property Stolen From the victims

8. Counsel Failed to Protect Williams' Rights When Counsel

Failed to Offer When a Single Objection to Improper Prosecutorial Comments

9. Counsel was Ineffective in Failing to object to Numerous Improper and Misleading Statements by the Commonwealth in opening and Closing Arguments During the Guilt/Innocence Phase of the Trial

B. Sentencing Phase

   1. Counsel Failed to Object to Testimony From the Victim's Mother

   2. Counsel Failed to Make a Timely Objection to Photographs of the Prince Edward Victims and to Properly Argue the Objection

   3. Counsel Failed to Develop Defense Evidence and Mitigation Evidence Through the Medical Examiner

   4. Counsel Failed to Develop Defense Evidence and Mitigation Through Williams' Brother

   5. Counsel Failed to Object to Cross Examination on Williams' Arrest at the Penalty Phase

   6. Counsel Failed to Present Evidence of Intoxication and Drug Use

   7. Counsel Failed to Protect the Testimony of Their Expert Witness During Objections and Interruptions by the Prosecutor and Court

8. Counsel Failed to Request an Evaluation by a Neuropsychologist

9. Counsel Failed to Present Williams' Testimony at the Sentencing Phase

10. Counsel Failed to object to a Deficient Instruction on Mitigation and Failed to Request a Corrective Mitigation Instruction

11. Counsel Failed to Object to Improper, Inflammatory and Prejudicial Argument and Failed to Request a Curative Instruction

12. Counsel Present Ineffective Argument at the Penalty Phase

C. Ineffective Assistance on Appeal

1. Failure to Appeal Denied Jury Instructions

2. Counsel Failed to Properly Appeal the Trial Court's Erroneous Restriction of Voir Dire and Violations of Witherspoon-Witt

3. Counsel Failed to Appeal the Trial Court's Failure to Remove Gary Davis in the Same Manner as the Removal Was Objected to at the Trial Court Level

VI. Williams Was Not Provided With the Effective Assistance of a Mental Health Expert Guaranteed Under *Ake v. Oklahoma*, 470 U.S. 68 (1985)

VII. Additional Constitutional Errors

A. Virginia's Death Penalty Statutes Are Unconstitutional as They Fail to Provide Guidance on the Meaning and Use of Mitigating Evidence

B. Virginia's Death Penalty Statutes Are Unconstitutionally Vague as They Fail to Provide the Sentencer With Sufficient Guidance to Assure that the Death Penalty is Not Imposed in an Arbitrary and Capricious Manner

C. Virginia's "Vileness" Factor, as Applied, Unconstitutionally Denies Defendant Notice and Meaningful opportunity to be Heard

D. The "Future Dangerousness" Aggravating Factor is Unconstitutionally Vague and Inherently Misleading as it Asks Jurors to Find a Probability Beyond a Reasonable Doubt

E. Section 19.2-264.4(c), Which Allows The Sentencer to Find "Future Dangerousness" Based on Unadjudicated Criminal Conduct, Violates The Sixth, Eighth and Fourteenth Amendments

F. The "Future Dangerousness" Aggravating Factor is Inherently Unreliable and is Insufficient to Guide Jury Discretion

G. Imposition of the Death Penalty in Virginia is Arbitrary Because of the Failure of the Supreme Court of Virginia to Engage in Meaningful or Fair Appellate Review

H. Virginia's Contemporaneous Objection Rule is Unconstitutional as Applied

I. Imposition of the Death Penalty Violates the Eighth and Fourteenth Amendments Since it Constitutes Cruel and Unusual Punishment

IV. THE APPLICABILITY OF THE 1996 ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT

On April 24, 1996, before Williams filed his federal habeas petition, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the "Act"), became effective. Title I of the Act, entitled "Habeas Corpus Reform," substantially alters the substantive law governing habeas corpus petitions. Sections 101 to 106 of the Act modify pre-existing habeas corpus procedures contained in Chapter 153 of the Judicial Code, 28 U.S.C. §§ 2241-2255. Section 107(a) of the Act enacts a new Chapter 154, 28 U.S.C. §§ 2261-2266, which applies to habeas petitions in capital cases.

This Court has previously held that the new Act did not apply because Virginia had not satisfied the "opt-in" requirements of § 107(a) and applying Chapter 153 violated retroactivity principles. *See Strickler v. Netherland* No. 3:95cv924 (E.D. Va. 1996); *Saunders v. Angelone*, No.3:95cv620 (E.D. Va. 1996). Respondent urges the Court to reconsider its prior ruling, arguing that the procedural posture of Williams' case differs significantly from that of *Strickler* and *Saunders*. In both those cases, petitioners filed their federal habeas petitions before the Act was enacted, and had entered state habeas proceedings before

the Virginia General Assembly passed their July 1995 amendments. Williams, however, filed his state habeas petition after July 1995 and then filed his federal habeas petition in November 1996 – seven months after the Act's enactment. The legal landscape governing Williams, petition has clearly changed since *Strickler* and *Saunders*.

A. Chapter 154: New Habeas Corpus Provisions

Section 107(a) of the Act, codified at Chapter 154, 28 U.S.C. §§ 2261-2266, essentially offers a system of expedited review and other "benefits" to states that qualify under either of two "opt-in" procedures: (1) the "post-conviction" procedure provided by 28 U.S.C. § 2261; or (2) the "unitary review" procedure provided by 28 U.S.C. § 2265. As this Court found in *Strickler*, the Fourth Circuit requires courts to analyze federal habeas petitions under § 107 of the Act because that section specifically states that the Act "shall apply to cases pending on or after the date of enactment of this Act." § 107(c); *see Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 503 (1996). Section 107 applies, however, only if Virginia satisfies the "opt-in" requirements. Since Virginia does not have a unitary review procedure, the Court must therefore analyze whether Virginia meets the post-conviction review procedures and thus, qualifies as an opt-in state.

1. The "Opt-In" Requirements

To qualify as an opt-in state, a state must meet all four of the following criteria:

(1) The State must establish by statute, rule of its court of last resort, or other agency authorized by state law, a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. *See* § 2261(b).

(2) Such mechanism must provide standards of competency for the appointment of such counsel. *See* § 2261(b).

(3) Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. *See* § 2261(c).

(4) Such mechanism must provide for an entry of a court order either appointing counsel to each capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. *See* § 2261(c).

2. Has Virginia Satisfied the Opt-In Requirements?

Since July 1, 1992, Virginia has required the appointment of counsel for post-conviction capital cases under Va. Code § 19.2-163.7. While the Fourth Circuit has not considered whether this appointment mechanism satisfies the requirements of Chapter 154, this Court finds that the automatic appointment of counsel for indigent defendants does meet the first opt-in criterion.

Virginia, however, still fails to reap the benefits of Chapter 154 because it has not provided a mechanism for

the compensation and payment of such counsel as required by the Act. While Virginia substantially complies with the law via the appropriations acts of the General Assembly that provide for the payment of such counsel, it has not specifically established a "mechanism" for payment as required by the Act. The Fourth Circuit recently noted that "the Virginia statutes and regulations do not specifically provide for the compensation or payment of litigation expenses of appointed counsel, as § 107 requires." *Bennett v. Angelone*, 92 F.3d 1336, 1342 n.2 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 503 (1996). This same conclusion was reached by the Court in *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996), *aff'd in part and rev'd in part on other grounds*, 126 F.3d 561 (4th Cir. 1997).

As the Court in *Satcher* noted, "[i]f Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so." *Id.* at 1242. Congress instead chose to confer such benefits to those states that have made a formal commitment to providing a post-conviction review system which would protect capital litigants, constitutional rights. *Id.* This Court agrees with this analysis and finds that Virginia's system for compensation and payment of expenses still fails to meet the standards established by § 107.[1] Thus, Virginia does not qualify as an opt-in state because it fails to adhere to the formal

[1] The Court is aware that the amended Va. Code § 19.2-163, effective July 1998, does provide for such a compensation and payment mechanism. This amendment, however, was not in effect at the time Williams filed his federal habeas petition.

requirements of § 2261. Accordingly, Chapter 154 does not apply to Williams' federal habeas petition.

B. Chapter 153 Amendments

Chapter 153 of the Act, §§ 101-106, effects a number of procedural changes to previous habeas corpus statutes codified in Chapter 153. Of particular relevance to Williams' petition is § 104 which substantively changes the standards of review under 28 U.S.C. § 2254.[2] Furthermore, unlike Chapter 154, the Chapter 153 amendments are not made explicitly applicable to petitions pending when the Act took effect. The U.S. Supreme Court in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), recently held that the amendments do not apply to habeas corpus cases that were pending when the Act took effect, thereby resolving a split among the circuits. Applying the amendments to these pending cases, the U.S. Supreme Court held, violates principles against retroactive application of laws. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994). The U.S. Supreme Court expressly found that "the amendments to chapter 153 [apply] only to such cases as were filed after the statute's enactment." *Lindh*, 117 S. Ct. at 2062.

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[2] Specifically, § 104 limits the grounds on which petitions may be granted (28 U.S.C. § 2254(d)), requires greater deference to state court findings of fact (28 U.S.C. § 2254(e)(1)), limits the availability of evidentiary hearings in a habeas court (28 U.S.C. § 2254(e)(2)), and eliminates ineffectiveness or incompetence of post-conviction counsel as a ground for relief under 28 U.S.C. § 2254 (28 U.S.C. § 2254(i)).

Williams' attempts to place his federal habeas petition in this "pending" box by arguing that he filed a state habeas petition before the Act's enactment and therefore, applying the amendments to his federal habeas petition would trigger *Landgraf's* retroactive effect. Indeed, if his federal habeas petition were pending when the Act took effect, this Court could not apply the Chapter 153 amendments pursuant to *Lindh*. Williams, however, filed his federal habeas petition in November 1996. His strained argument – that the amendments would have an impermissible retroactive effect on his federal habeas petition merely because he went through state post-conviction proceedings with the assumption that he would enter federal review under the old 28 U.S.C. § 2254 – is contrary to the U.S. Supreme Court's directive in *Lindh*. Therefore, the Chapter 153 amendments enacted seven months before Williams filed his federal habeas petition will govern his claim.

V. EXHAUSTION AND PROCEDURAL DEFAULT

This Court's review of Williams' federal habeas petition is restricted to an inquiry of whether his confinement and sentence are in violation of federal constitutional or statutory law. *See* 28 U.S.C. § 2241(c)(3). Before this Court can reach the merits of any claim, however, Williams must demonstrate that he has exhausted all state court remedies. *See Rose v. Lundy*, 455 U.S. 509 (1982). This requirement is strictly enforced in the interest of giving the state courts the first opportunity to consider any alleged errors. *See id.*

A state court has not been given a full opportunity to rule on a claim unless it has been presented before the state's highest court. *See Brown v. Allen*, 344 U.S. 443 (1953). In presenting a claim to the state court, the petitioner must "fairly present" claims cognizable under federal law. *See Picard v. Connor*, 404 U.S. 270 (1971). That is, in order to exhaust a federal claim for purposes of federal habeas corpus review, a petitioner cannot simply raise the claim in state court, citing state law, even if the state claim is analytically similar to a federal claim. *See Anderson v. Harless*, 459 U.S. 4 (1982); *Duncan v. Henry*, 513 U.S. 364 (1995) (presentation of a "miscarriage of justice" claim under California law was not the same as an allegation of a violation of federal due process).

Furthermore, Williams is not entitled to-federal review of claims which are procedurally defaulted. These include claims defaulted under an independent and adequate state procedural rule, *Coleman v. Thompson*, 501 U.S. 722, 750 (1992), and claims never presented to a state court, *Gray v. Netherland*, 116 S. Ct. 2074, 2080-81 (1996). In Virginia, no writ of habeas will be granted on the basis of any legal or factual claim which the petitioner previously could have made, but did not. *See Gray*, 116 S. Ct. at 2080; *Slayton v. Parricran*, 215 Va. 27 (1974), *cert. denied*, 419 U.S. 1108 (1975). In order to overcome this procedural bar, the petitioner must demonstrate good cause for his failure to preserve the issue and prejudice resulting from the constitutional violation, *Gray*, 116 S. Ct. at 2080, or that there has been a fundamental miscarriage of justice, *Coleman*, 501 U.S. at 750.

In this case, Williams raised several of the present claims in his petition for a writ of habeas corpus before

the Virginia Supreme Court. His remaining claims are exhausted because they were never raised in state court and could not be raised in state court now. *See* Va. Code Ann. §§ 801.654(3)(2) and 801.654-1.

A. Defaulted Claims[3]

1. Cause and Prejudice Analysis

The U.S. Supreme Court has recognized at least three categories of "cause" which are sufficient to overcome a state procedural default: (1) counsel's inability to know of a legal or factual issue; (2) interference by the prosecution with the habeas petition; and (3) ineffective assistance of counsel. *See Murray v. Carrier*, 477 U.S. 478 (1986). In addition, a federal court may grant habeas relief in the "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

2. Claims Barred under Slayton v. Parrigan

The Virginia Supreme Court ruled that several of Williams' state habeas claims were defaulted under *Slayton v. Parrigan*, 215 Va. 27 (1974), *cert. denied*, 419 U.S. 1108 (1975). Under the rule in *Slayton*, state habeas review is barred by the failure to raise an issue at trial and on

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[3] Williams has numbered the claims in his federal habeas petition differently than in his state habeas petition. To avoid confusion, the Court will refer to the numbers designated in Williams' federal habeas petition.

direct appeal. *Id. Slayton* is a well-recognized bar to federal review. *See Spencer v. Murray*, 18 F.3d 229, 232 (4th Cir. 1994).

As a preliminary matter, Williams asserts that the Virginia Supreme Court mistakenly applied *Slayton* to Claims III(A)(5), III(A)(6), III(A)(7), and III(B)(11) because he raised those claims at trial and on direct appeal. A review of the record confirms that contention. Respondent correctly notes, however, that Williams did not raise these claims on federal constitutional grounds; rather, Williams solely argued matters of state law. Having failed to "fairly present" these claims as federal constitutional claims before the state's highest court, Williams cannot now "federalize" Claims III(A)(5), III(A)(6), and III(A)(7) for purposes of federal habeas review. *See Picard v. Connor*, 404 U.S. 270 (1971). As for Claim III(B)(11), the Virginia Supreme Court expressly ruled that it was procedurally defaulted under its Rule 5:25. Accordingly, because Williams has failed to show "cause" for the default of these claims, this Court is precluded from further reviewing Claims III(A)(5), III(A)(6), III(A)(7), and III(B)(11).

Williams can revive the remaining claims barred under *Slayton* if he can demonstrate cause and prejudice, or that there has been a fundamental miscarriage of justice. Williams asserts ineffective assistance of counsel as "cause" for these defaulted claims.[4] Because it is also the

[4] In order to establish "cause" for a procedural default, a claim of ineffective assistance of counsel must have been presented to the state courts as an independent claim. *See Murray v. Carrier*, 477 U.S. 478, 489 (1986) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). In other words, an assertion of ineffective assistance of counsel cannot constitute "cause" excusing a procedural default where the underlying allegation of ineffectiveness is itself procedurally barred. *See Justus v. Murray*, 897 F.2d 709 (4th Cir. 1990).

freestanding theory advanced in Claim V, it is discussed as part of the general discussion in Claim V. As noted below, this Court has determined that the ineffective assistance of counsel claims set forth by Williams in Claim V are meritless. Accordingly, Williams cannot establish "cause" for the *Slayton* procedural default. *See infra* at 56-94. This Court is therefore precluded from reviewing Claims III(A)(1), III(A)(2)(a)-(c), III(A)(4), III(A)(5), III(A)(6), III(A)(7), III(B)(1), III(B)(4), III(B)(7), III(B)(8), III(B)(9), III(B)(10), III(B)(11), IV(A)(3), IV(A)(4), IV(B)(1), IV(B)(2), VI, VII(G),[5] VII(H),[6] VII(I)[7].

3. Claims Never Presented in State Court

Williams failed to present the following claims at the state court level: I(A), I(C), III(A)(2)(b),[8] III(A)(2)(d),[9]

[5] To the extent Williams relies on the prosecutor's closing arguments.

[6] Williams concedes that this claim is procedurally defaulted. *See* Pet'r Opp'n at 79.

[7] To the extent Williams relies on the length of time he will spend on death row.

[8] This claim is barred under *Slayton*. *See infra* at 23-24.

[9] Williams argues that Respondent has misconceptualized his argument that the trial court seated a jury predisposed to impose a death sentence in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968). *See* Pet'r Opp'n at 22. Williams asserts that he has never argued this claim independent of his claims

III(A)(3), IV(A)(2), IV(A)(5), V(A)(3)(b),[10] V(A)(5)(b),[11] V(C)(1),[12] V(C)(2),[13] VII(A),[14] and VII(H)[15]. Despite this procedural bar, these defaulted claims will be revived for purposes of federal habeas review if Williams can show (1) cause for, and prejudice from, the default; or (2) the existence of a fundamental miscarriage of justice.

Claims I(A) and IV(A)(5)

Williams claims that his constitutional rights to be tried by an impartial jury and to be tried based only on the evidence presented at trial were violated by the presence of Juror Stinnett on the jury. Juror Stinnett's former husband was Deputy Sheriff Claude B. Meinhard, the detective who interviewed Cruse about the murders and who testified for the Commonwealth. Furthermore, the prosecutor, Robert G. Woodson, Jr., had represented Deputy Meinhard during his divorce. Although asked on voir dire whether she was related to any of the witnesses or if she or any family member had ever been represented by

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regarding Jurors Trent, Holman, and Davis. Thus, it is a mischaracterization to state that it was never raised in state court proceedings and it should therefore not be dismissed separately.

[10] *See infra* at 64.

[11] *See* infra at 67-68.

[12] Respondent concedes that this claim was raised in Williams' state habeas petition. *See* Resp't Reply at 26.

[13] Respondent concedes that this claim was raised in Williams' state habeas petition. *See* Resp't Reply at 26.

[14] *See infra* at 43.

[15] *See supra* note 6.

any of the attorneys involved in the case, Juror Stinnettt never revealed her former marriage to Deputy Meinhard or that they had four children together. Prosecutor Woodson never mentioned his representation of Deputy Meinhard either. As a result, Williams argues that defense counsel could not conduct meaningful voir dire and could not intelligently exercise their peremptory challenges or challenges for cause. Thus, Williams contends that he was deprived of a fair trial under *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir. 1980).

In response, Respondent argues that Williams has procedurally defaulted these claims because he failed to raise them on state habeas. Moreover, even if Williams could surmount the "cause" hurdle, he has failed to demonstrate "prejudice." Juror Stinnett divorced Deputy Meinhard fifteen years prior to the trial, and Deputy Meinhard was an insignificant witness for the Commonwealth. Indeed, Respondent points out that the defense did not cross-examine Deputy Meinhard, and his credibility was never at issue.

Irrespective of Deputy Meinhard's importance as a witness, however, if Williams can demonstrate "cause" for the procedural default, he will have automatically demonstrated "prejudice" under *Bynum*. In *Bynum*, the Fourth Circuit reversed a conviction because a juror, when asked whether he had a relative or close friend who had been either a defendant or victim of a crime, failed to reveal his brother's existence as a convicted felon. In so holding, the Fourth Circuit stated:

> Certainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness of a potential juror's answers on

> *voir dire*, the result is deprivation of the defendant's rights to a fair trial. [The juror] by his concealment impaired the right of [the defendant] to exercise intelligently a peremptory challenge to remove a juror who was suspected of being partial.

Bynum, 634 F.2d at 771 (footnotes omitted); *see also United States v. Brown*, 799 F.2d 134 (4th Cir. 1986) (voir dire that has the effect of impairing the defendant's ability to meaningfully and intelligently exercise his challenges is grounds for reversal).

Like the juror in *Bynum*, Juror Stinnett deliberately failed to tell the truth on voir dire.

> COURT: Have you or any member of your immediate family ever been represented by [Mr. Woodson]?
>
> JURORS: (Two [Stinnettt and Carter] have no affirmative response.)

Tr. 1-3-94 at 116.

> COURT: Are any of you involved in law enforcement?
>
> JURORS: (No affirmative response.)
>
> COURT: Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard . . . ?
>
> JURORS: (No affirmative response.)

Id. at 123-24. Like the juror in *Bynum*, Juror Stinnett's intentional nondisclosure on voir dire gives rise to a presumption of actual bias. Assuming that Prosecutor

Woodson knew of Juror Stinnett's relationship to Deputy Meinhard based on his representation of Deputy Meinhard in the divorce, his subsequent failure to advise the court or defense counsel of Juror Stinnett's dishonesty had a substantial and injurious effect on Williams' ability to select impartial jurors.

Although Respondent argues that Williams has failed to demonstrate "cause," the Court disagrees. There is no evidence that Williams' defense or state habeas counsel knew or could have known of Juror Stinnett's relationship to Deputy Meinhard absent disclosure by the prosecutor. Because Prosecutor Woodson never notified the court or defense counsel of his prior representation of Deputy Meinhard or of his knowledge of Deputy Meinhard's relationship to Juror Stinnett, the Court finds that this information was not reasonably available to defense counsel and that they were unable to know of this issue. Accordingly, the Court will grant an evidentiary hearing on these allegations of juror and prosecutorial misconduct. The motion to dismiss this claim will be denied.

Claim I(C)

Williams argues that three jurors improperly considered his parole eligibility during the sentencing phase of his trial – specifically, the jurors reported that they believed Williams would be released after 33 years if given a life sentence. Williams now argues that the jurors' consideration of this extrajudicial evidence violated his right to be convicted solely on evidence introduced in open court. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982).

The Court will dismiss this claim because it is procedurally defaulted. Even if Williams could demonstrate "cause," he has failed to show that the jurors' internal discussion prejudiced him. Such evidence is inadmissible under Rule 606(b) of the Federal Rules of Evidence, and Williams has failed to prove that the jury's internal discussion of parole constitutes impermissible "extrajudiciall, evidence to circumvent Rule 606(b)'s bar.

Claim III(A)(3)

Williams argues that the trial court erred when it refused to permit in-depth individual questioning on voir dire regarding pretrial publicity. Respondent asserts that this claim is procedurally defaulted because Williams failed to raise it in state court. Because Williams offers no "cause" for the default, the Court will dismiss this claim.

Claim IV(A)(2)

In September 1993, while incarcerated for the Keller murders, Cruse was evaluated by a psychiatrist who reported that "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time." Pet'r Ex. D. Despite being ordered to disclose all *Brady* material, the Commonwealth failed to provide this report to Williams' defense counsel. Williams now argues that this violation substantially impaired his ability to cross-examine and impeach Cruse.

The prejudice resulting from the Commonwealth's failure to comply with its *Brady* obligations is clear. As

noted in the discussion of Claim IV(A)(1), Cruse played a critical role in the Commonwealth's case against Williams. Because both defendants offered drastically different versions of the shootings, Cruse's testimony on the triggerman issue and his credibility as a witness determined who would be convicted of capital murder. Information that Cruse had little to no recollection of the murders would have undoubtedly undermined his credibility and cast doubt on his ability to remember the shootings with such detail.

Irrespective of this showing of "prejudice," Respondent argues that this claim is procedurally defaulted because Williams has failed to demonstrate why this claim could not have been discovered with due diligence in time to be raised in state court. The Fourth Circuit has held that "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir.) (citation omitted), *cert. denied*, 117 S. Ct. 630 (1996).

Although defense counsel were entitled to rely on the belief that the prosecution would comply with the Constitution and thus produce all *Brady* material upon request,[16] Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded

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[16] *See Dobbs v. Zant*, 113 S. Ct. 835, 836 (1993).

the same type of assistance at both state and federal habeas – namely, court-appointed attorneys. The Court cannot discern any reason and has been offered no explanation why state habeas counsel failed to discover the report and present it in state habeas proceedings. Accordingly, the Court will dismiss this claim.

VI. CLAIMS ADDRESSED ON THE MERITS

A. Applicable Law

1. Standard of Review

Under the recently revised Title 28 United States Code Section 2254, a federal court may not grant a writ of habeas corpus based on any claim that was adjudicated on the merits in state court unless the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Although this new standard requires more deference to state court findings, it is not a complete abdication of the federal court's duty to provide meaningful review.

2. Harmless Error

Federal habeas courts routinely conduct harmless error analysis of errors occurring in capital cases. *See, e.g.,*

Cabana v. Bullock, 474 U.S. 376, 391 n.6 (1986); *Smith v. Dixon*, 14 F.3d 956, 978 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 841 (1994). In federal habeas corpus proceedings, an error is deemed harmful only if it "had substantial and injurious effect or influence in determining the jury's verdict." *Chapman v. California*, 386 U.S. 18, 24 (1967) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quotation omitted)).

3. New Rule Doctrine

Where a federal habeas petitioner seeks relief by application of a constitutional rule, the Court must examine the rule to determine whether it had been announced at the time the petitioner's conviction became final or whether the petitioner is seeking an extension of long-standing precedent. As a general matter, federal courts may not grant state prisoners relief in collateral proceedings if to do so would create a "new rule" of constitutional law, subject to two narrow exceptions."[17] *See Teague v. Lane*, 489 U.S. 288 (1989). Since *Teague*, the U.S. Supreme Court has articulated the test to determine whether a rule is a "new rule" such that it should not be applied retroactively:

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[17] Under *Teague*, a "new rule" should be applied retroactively if (1) it "plac[es] certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe," or (2) it is a "watershed rule[s] of criminal procedure," implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. 288, 311 (1989).

> Though we have offered various formulations of what constitutes a new rule, put "meaningfully for the majority of cases, a decision announces a new rule 'if the result was not dictated by precedent existing at the time the defendant's conviction became final.' "

Gilmore v. Taylor, 508 U.S. 333, 340 (1993) (citation omitted).

Where the petitioner requests the Court not to apply a rule announced after his conviction became final, but to adopt a rule not previously announced, the Court must first determine whether such a rule would be retroactively applied if adopted. If the court determines that the rule, if adopted, would not be retroactively applied, then the Court should dismiss the claim without reaching the merits. *See Penry v. Lynaugh*, 492 U.S. 302 (1989). Under *Teague*, a court faced with this situation should proceed in three steps. First, the Court must ascertain the date on which the conviction and sentence became final. Second, the Court must determine whether a state court considering the defendant's claim on that date would have felt compelled by existing precedent to conclude that the rule sought by the petitioner was required by the Constitution. Third, even if the Court determines that the petitioner seeks the benefit of a new rule, the Court must decide whether the rule falls into one of the two *Teague* exceptions. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994).

Even if the Court determines that the petitioner does not seek to apply or adopt a "new rule", the Court must still "inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent."

Stringer v. Black, 503 U.S. 222, 228 (1992). The Court should be mindful, however, that the "new rule" doctrine is not necessarily implicated every time the Court applies an established standard to a new set of facts. *See id.*

B. Claims Barred Under *Hawks v. Cox*

The Virginia Supreme Court ruled that Claims II(A), III(A)(8), III(B)(3), III(B)(5), III(B)(6), VII(A), VII(B), VII(C), VII(D), VII(E), VII(F), VII(G), and VII(I) were barred under the rule in *Hawks v. Cox*, 211 Va. 91 (1970). "*Hawks*, however, is not a true procedural default rule. . . . *Hawks* cannot prevent federal habeas review of federal constitutional claims properly raised on direct appeal." *Turner v. Williams*, 35 F.3d 872, 890 (4th Cir. 1994) (citation omitted), *overruled on other grounds, O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996). Therefore, the Court must determine whether Williams raised the aforementioned claims on direct appeal.

A review of the record indicates that Williams did present the claims, albeit more general versions, on direct appeal of his conviction. The record further discloses that the Virginia Supreme Court adjudicated those claims on the merits. Although this Court has reviewed the aforementioned claims, it may only grant relief in limited circumstances. *See* 28 U.S.C. § 2254(d). As demonstrated below, none of the statutory exceptions apply and the Court will not grant relief as to these claims.

Claim II(A)

Williams argues that the evidence adduced at trial was insufficient to establish beyond a reasonable doubt that he was the "triggerman." Under Virginia law, only the immediate perpetrator of a murder may be convicted of capital murder and only after being found beyond a reasonable doubt to be the triggerman who fired the fatal shot. *See* Va. Code § 18.2-18; *Johnson v. Commonwealth*, 220 Va. 146, 150 (1979), *cert. denied*, 454 U.S. 920 (1981). Williams argues that given the facts in his case, it is impossible to determine whether he or Cruse fired the fatal shots. Williams accordingly argues that even if the Court is unwilling to reverse at the guilt stage, he should be granted a new sentencing hearing in order to determine on which capital convictions the jury recommended the death penalty.

In evaluating a claim based on insufficiency of the evidence, the reviewing court must view the evidence in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The critical inquiry is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. "But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318-19.

The evidence at trial painting Williams as the triggerman primarily consisted of the testimony of Cruse. Cruse

testified that Williams fired all of the shots that killed Mr. Keller and fired two of the three shots that killed Mrs. Keller. Williams himself admitted to firing the first shot into Mr. Keller's head. While the physical evidence does not directly prove that Williams was the triggerman, Cruse's testimony and Williams' own testimony, when viewed in the light most favorable to the Commonwealth, convincingly demonstrate that Williams played a "direct part in inflicting injuries" and is thus liable for capital murder. *See Strickler v. Commonwealth*, 241 Va. 482, *cert. denied*, 502 U.S. 944 (1991). Williams' argument that Cruse fired the first and fatal shot at Mrs. Keller was presented to the jury and the Virginia Supreme Court which found that it did not have merit in the face of the other testimony linking Williams to the shootings. Simply, the jurors chose to believe Cruse over Williams' and credibility determinations are properly within their province. Thus, after reviewing the evidence in the light most favorable to the prosecution, the Court finds that a rational trier of fact could have found beyond a reasonable doubt that Williams, and not Cruse, was the triggerman.

Claim III(A)(8)

Williams argues that the trial court erred when, over defense counsel's objection, it allowed the prosecutor to impeach Williams' testimony by referring to the fact that Williams was the only witness permitted to stay in the courtroom and thus, hear the testimony of all the other witnesses. Williams contends that this error impermissibly burdened his constitutional right to confront his accusers, to be present at all times during his trial, to present evidence in his favor, and to compel process.

Respondent argues, however, that existing case law does not prohibit a prosecutor from commenting in such a manner and that to grant federal collateral relief on this claim would violate the "new rule" doctrine.

A survey of existing caselaw confirms Respondent's contention. Although Williams argues that *Griffin v. California*, 380 U.S. 609 (1965) (Fifth Amendment violation to comment on the defendant's failure to take the witness stand), and *Brooks v. Tennessee*, 406 U.S. 605 (1972) (Fifth Amendment violation to require the defendant to testify first for the defense or not at all), implicitly support his position, the Court finds that the result urged by Williams is not dictated by existing precedent. To hold otherwise would create a "new rule" which this Court is severely restricted from doing under *Teague* and its progeny.

Although the Court has concerns about the propriety of the prosecutor's comments in this particular case, prosecutorial impeachment of the defendant's testimony through this type of cross-examination has not yet been held violative of the defendant's constitutional rights – notwithstanding Williams' persuasive *Brooks* argument to the contrary. Although the Court must thus deny Williams relief on this claim, a final point needs to be made. In rejecting this claim on direct appeal, the Virginia Supreme Court stated "[w]e fail to see how [Williams, constitutional] rights are violated by a question that reflected what the jury already knew." *Williams*, 248 Va. at 544. In *Griffin*, the U.S. Supreme Court rejected this exact rationale in the context of prosecutorial comment on the defendant's failure to testify:

> What a jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

380 U.S. at 614-15. This Court similarly finds this aspect of the Virginia Supreme Court's justification for dismissing the claim erroneous and unpersuasive.

Claim III(B)(3)

Williams argues that the trial court erred in denying his motion for jury instructions on the meaning of a life sentence and his mandatory 30 year ineligibility for parole. In support of this argument, Williams cites *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), wherein the U.S. Supreme Court held that a sentencing jury must be instructed that a capital defendant is ineligible for parole when the prosecution argues "future dangerousness." Recently, however, the U.S. Supreme Court held that *Simmons* constitutes a "new rule" for purposes of habeas review and thus, cannot be used to overturn a habeas petitioner's death sentence. *See O'Dell v. Netherland*, 117 S.Ct. 1969 (1997). Accordingly, Williams' claim which seeks "a logical and modest extension" of *Simmons* is likewise barred under the *Teague* doctrine.

Claim III(B)(5)

Williams argues that the trial court erred in allowing the prosecutor to present evidence of the unadjudicated Prince Edward County homicides at the penalty stage as proof of "future dangerousness." Courts have uniformly

rejected the argument that evidence of prior unadjudicated criminal conduct cannot be considered in assessing "future dangerousness." *See, e.g., Eaton v. Angelone*, 1998 WL 128570, *9 (4th Cir. 1998) (citing cases); *see also Jurek v. Texas*, 428 U.S. 262, 276 (1976) (stating that the jury must "have before it all possible relevant information about the individual defendant whose fate it must determine"). Thus, the Virginia Supreme Court's rejection of Williams' claim was not contrary to, or an unreasonable application of, clearly established federal law.

Claim III(B)(6)

Williams argues that not only did the trial court err in allowing evidence of unadjudicated crimes, but that it failed to instruct the jury that such crimes must be proved beyond a reasonable doubt in order to be used in the sentencing determination. This Court has repeatedly rejected claims that Virginia's "future dangerousness" factor is unreliable because it may be proved with evidence of unadjudicated crimes. *See, e.g., Breard v. Netherland*, 949 F.Supp. 1255, 1267 (E.D. Va. 1996) (Williams, J.), *aff'd*, 134 F.3d 615 (4th Cir. 1998); *Pruett v. Thompson*, 771 F.Supp. 1428, 1442-43 (E.D. Va. 1991) (Spencer, J.), *aff'd*, 996 F.2d 1560 (4th Cir.), *cert. denied*, 510 U.S. 984 (1993); *see also Richardson v. Johnson*, 864 F.2d 1536, 1541 (11th Cir.) (citing cases), *cert, denied*, 490 U.S. 1114 (1989). Accordingly, the trial court did not err in refusing to instruct the jury that the unadjudicated Prince Edward County homicides must be proved beyond a reasonable doubt.

Claim VII(A)

Williams argues that the Virginia death penalty statutes are unconstitutional as they fail to provide the jury with any guidance on the meaning and use of mitigation evidence. The Fourth Circuit, however, has routinely rejected the claim that the standard Virginia sentencing instruction does not adequately inform the jury on the issue of mitigation. *See, e.g., Buchanan v. Angelone*, 103 F.3d 344, 347-48 (4th Cir. 1996) (holding that "Virginia's death penalty scheme survives constitutional scrutiny, despite its 'failure to instruct the jury on statutory mitigating factors' ") (citation omitted); *Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992); *Clozza v. Murray*, 913 F.2d 1092, 1005 (4th Cir. 1990), *cert. denied*, 499 U.S. 913 (1991). In light of this precedent, Williams' claim must fail.

Claims VII(B) and VII(C)

Williams argues that the "vileness" aggravating factor is unconstitutionally vague in that it does not define what constitutes "outrageously or wantonly vile, horrible or inhuman [conduct]." Va. Code § 19.2-264.4(C). The Virginia Supreme Court rejected this challenge outright as already addressed and answered by the decision in *Mickens v. Commonwealth*, 247 Va. 395, 402-403 (1994). The Fourth Circuit has likewise rejected this challenge on numerous occasions. *See, e.g., Turner v. Williams*, 35 F.3d 872, 891-94 (4th Cir. 1994); *Jones v. Murray*, 976 F.2d 169, 174 (4th Cir.), *cert. denied*, 505 U.S. 1245 (1992). The Court rejects Williams' claims for the same reasons.

Claims VII(D), VII(E), and VII(F)

In attacking the "future dangerousness" aggravating factor, Williams argues that it is unconstitutionally vague, misleading, and unreliable and that the use of unadjudicated criminal acts is improper. Fourth Circuit case law holds otherwise. *See Spencer v. Murray*, 5 F.3d 758, 764-65 (4th Cir. 1993), *cert. denied*, 510 U.S. 1171 (1994); *Giarratano v. Procunier*, 891 F.2d 483, 489-90 (4th Cir. 1989), *cert. denied*, 498 U.S. 881 (1990). Furthermore, for the reasons stated above with respect to Claims III(B)(5) and III(B)(6), the Court rejects these claims.

Claim VII(G)

Williams claims that the Virginia Supreme Court failed to engage in meaningful or fair appellate review of his case under Va. Code § 17-110.1, which requires the court to ensure that the death penalty was not "imposed under the influence of passion, prejudice or any other arbitrary factor." A review of existing case law reveals, however, that the existence of such a claim has never been recognized or alluded to by the U.S. Supreme Court. *See George v. Angelona*, 901 F.Supp. 1070, 1090 (E.D. Va. 1995), *aff'd*, 100 F.3d 353 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 854 (1997). Accordingly, the Court must dismiss Williams' challenge to the state appellate process as barred by the "new rule" doctrine.

Claim VII(I)

Williams argues that imposition of the death penalty constitutes cruel and unusual punishment in violation of

the Eighth Amendment. The Virginia Supreme Court, however, rejected this claim as already answered in *Beaver v. Commonwealth*, 232 Va. 521, 527, *cert. denied*, 483 U.S. 1033 (1987). The Fourth Circuit similarly has rejected this argument outright. *See Briley v. Booker*, 746 F.2d 225, 227 (4th Cir. 1984). Accordingly, this Court must also reject this claim of constitutional error.

C. Preserved Claims

1. Juror Misconduct

Claim I(B)

Williams asserts that a juror may have introduced extrajudicial evidence to the jury. Specifically, Williams claims that Juror Blanton may have received information from her husband, a Virginia State Trooper, who had previously arrested Williams on unrelated charges. Although the jury was sequestered during the trial, the jurors were allowed to return home after being selected. It is during this brief period of time that Williams believes Juror Blanton learned of his previous arrests from her husband – extrajudicial information which she may have then shared with her fellow jurors.

It is well-settled that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . ." *Remmer v. United States*, 347 U.S. 227, 229 (1954). In the Fourth Circuit, this presumption of prejudice is established if "there is a reasonable possibility that the

jury's verdict was influenced by the material that improperly came before it." *United States v. Barnes*, 747 F.2d 246, 250 (4th Cir. 1984) (citations and quotations omitted).

In the instant case, however, Williams has failed to provide any evidence that Juror Blanton's husband told her about the previous arrests or that if factual, Juror Blanton shared this information with the other jurors. This omission is particularly glaring in light of the unrebutted affidavit submitted by Juror Blanton in the state habeas proceedings. *See* Resp't State Ex. E. In that affidavit, Juror Blanton unequivocally denies Williams' allegations. She states that she answered the trial court's voir dire questions truthfully; she never discussed the case with her husband until the trial concluded; no extrinsic information was communicated to her; and she had no knowledge of Williams' prior record until evidence of it was introduced at trial. *See id.* Although Williams is correct that the burden is on the government to prove that the jury's exposure to extrajudicial information was harmless, the Court need not reach that issue here because Williams has failed to establish the threshold issue – that extrajudicial information was, in fact, introduced to the jury.

In the absence of any rebuttal evidence, the Court does not find that the Virginia Supreme Court's dismissal of this claim was contrary to clearly established precedent or the result of an unreasonable determination of the facts. *See* 28 U.S.C. §§ 2254(d), (e). Accordingly, this claim will be dismissed.

2. Insufficiency of the Evidence

In evaluating a claim based on insufficiency of the evidence, the reviewing court must view the evidence in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The critical inquiry is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. "But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318-19.

Claim II(B)

Williams argues that the evidence adduced at trial was insufficient to establish beyond a reasonable doubt that the robbery and rape were committed sufficiently close in time and place to the shooting of the Kellers to elevate their subsequent murders to capital murder. Williams asserts that "[t]he rape and robbery had been completed long before the murders occurred." Pet. at 39. The Court finds that this assertion is clearly unsupported by the evidence.

It is undisputed that Williams and Cruse went to the Kellers' house intending to commit robbery. While there, Williams and Cruse ordered the Kellers to remove all their clothes, locked them in closets, searched the house, raped Mrs. Keller, and forced the Kellers to "take a walk" after they had showered and changed into clean clothes.

Shortly thereafter, Williams and Cruse killed the Kellers so as to not leave any witnesses. Based on the foregoing, the Court finds that the record amply supports the conclusion that the rape and robbery were sufficiently close in time and place to the murders to be predicate felonies for the capital conviction. Accordingly, this claim must be dismissed.

3. Trial Court Errors

Claim III(B)(2)

Williams claims that the trial court erred when it granted his request for a Bill of Particulars only as to prior unadjudicated acts of criminal conduct on the issue of "future dangerousness" Williams contends that had the trial court required the Commonwealth to specify before trial the components of the "vileness" aggravator, the Commonwealth would not have mistakenly introduced the photographs of the Prince Edward County victims to prove "vileness" and/or defense counsel would have had the opportunity to file a motion in limine in order to prevent the submission of the photographs. Williams argues that this error violated his Sixth Amendment right to be informed of the nature of the charges against which he must defend. *See, e.g., In re Ruffalo*, 390 U.S. 544 (1968); *Cole v. Arkansas*, 333 U.S. 196 (1948); *Rosen v. United States*, 161 U.S. 29 (1896).

On direct appeal, the Virginia Supreme Court rejected this due process claim:

> In our opinion, due process does not require that the Commonwealth limit itself to a pre trial

> construction of the character of Williams's conduct. Furthermore, Williams has no constitutional right to a bill of particulars if the indictments are sufficient to give him notice of the nature and character of the offenses charged, which these indictments do, so that he can make his defense. *Strickler v. Commonwealth*, 241 Va. 482, 490-91, 404 S.E.2d 227, 233, *cert. denied*, 502 U.S. 944 (1991); *Spencer v. Commonwealth*, 238, (sic) Va. at 303-304, 384 S.E.2d at 791.

Williams, 248 Va. at 538. Respondent argues that this Court must defer to the Virginia Supreme Court's reasonable rejection of Williams' claim and that to grant federal collateral relief would violate the "new rule" doctrine.

Pursuant to a recent U.S. Supreme Court decision, *Gray v. Netherland*, 116 S.Ct. 2074 (1996), the Court finds that Respondent is correct. In *Gray*, the U.S. Supreme Court held that granting relief on a petitioner's claim that he had a due process right to be given adequate notice of the evidence to be used against him during the penalty stage of his capital murder trial would require the adoption of a "new rule." *See id.* at 2084. Although Williams argues that he was not requesting "penalty-stage discovery," the Court finds otherwise. Because federal habeas relief is not available on a "notice-of-evidence" claim, the Court must dismiss this claim.

4. Prosecutorial Misconduct

Claim IV(A)(1)

Williams alleges that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose to the defense that Cruse did in fact have an agreement

with the Commonwealth for a life sentence in exchange for his testimony against Williams. Respondent points out, however, that both the Commonwealth's Attorney and Cruse's attorney have confirmed under oath that Cruse had no formal plea agreement with the Commonwealth at the time of Williams' trial. *See* Resp't State Ex. C, D (affidavits).

It is undisputed that prior to trial, the Commonwealth informed defense counsel that a plea agreement had previously been reached with Cruse, that the agreement had been breached by Cruse, and that the Commonwealth had revoked the agreement. However, the Commonwealth never produced a copy of the revoked written plea agreement to defense counsel. In fact, until the agreement was introduced by the Commonwealth at trial, defense counsel had thought that the agreement had been oral. *See* Aff. of R. Donald Ford, Jr. ¶ 8.

In any event, Williams contends that Cruse and the Commonwealth did have an understanding that Cruse would not receive the death penalty in return for his cooperation and testimony against Williams. In support of this allegation, Williams proffers the following:

(1) statements made by Cruse and the prosecutor during Cruse's direct and redirect examination which indicated that a plea agreement was expected as a result of Cruse's testimony against Williams;

> Q: You've indicated to the jury you're charged with capital murder right now; is that correct?
>
> A: Correct.

> Q: Is it your understanding that *the Judge is going to decide whether you live or die*?
>
> A: Correct.
>
> Tr. 1-4-94 at 212 (emphasis added).

(2) statements made by the prosecutor during closing arguments which raised a clear inference that there was a direct relationship between the content of Cruse's testimony and his sentence on charges of capital murder;

> [Cruse] sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. *And like he told you right now his back is against the wall; if he lies, he dies,* and that is his situation.
>
> Tr. 1-6-94 at 52 (emphasis added).

(3) Cruse's plea of guilty to the capital murder of Mrs. Keller two months after Williams' conviction;

(4) the reduction of the charge of first degree murder of Mr. Keller to participation as a principal in the second degree;

(5) the fact that Cruse pled guilty before a trial date was ever set in his case; and

(6) the Commonwealth's sentencing recommendation that Cruse's life be spared.

Williams argues that when viewed together, this sequence of events strongly suggests that some sort of understanding or informal agreement existed between Cruse and the Commonwealth at the time of Williams' trial.

In dismissing this claim, the Virginia Supreme Court provided no insight as to the manner or reason by which it made its factual or legal determinations. The deferential standard mandated by 28 U.S.C. § 2254(d) therefore has less meaning in this situation. *See Cardwell v. Netherland*, 971 F.Supp. 997 (E.D. Va. 1997). The Court is mindful, however, that its review is restricted to those facts as presented in state court proceedings.

Pursuant to *Brady*, the Commonwealth is required to disclose evidence that is favorable to the defendant and "material either to guilt or punishment." *Brady*, 373 U.S. at 87. This includes impeachment evidence because "such evidence is 'evidence favorable to an accused' [ ] so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (internal citation omitted). Disclosure of such evidence is especially important where, as here, "the reliability of a given witness may well be determinative of guilt or innocence[.]" *Id.* at 677.

In the instant case, Cruse played a critical role in the Commonwealth's case against Williams. It is undisputed that the physical evidence could not conclusively establish who fired the fatal shots. Not only could it not be determined in what sequence the shots were fired, but the bullet fragments from Mr. Keller's wounds could not be identified. Given that both Cruse and Williams offered drastically different versions of the shootings,[18] Williams'

[18] Cruse testified that he fired only once – at Mrs. Keller – and that Williams fired all other shots. Williams, however, testified that he fired only once – the non-fatal wound to Mr. Keller's head – and that Cruse fired all other shots, including the three shots to Mrs. Keller's head.

conviction clearly hinged on the credibility of each defendant. As evidenced by the jury's verdict, the jury chose to believe Cruse over Williams. Had the jury known that Cruse had some sort of agreement, understanding, or expectation with the Commonwealth regarding his sentence for the Keller murders, there is little doubt that their assessment of Cruse's credibility would have been affected. As the U.S. Supreme Court has stated, "[t]he fact that the stake [in the petitioner's conviction] was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction." *Bagley*, 473 U.S. at 683.

Accordingly, Williams was entitled to know whether any informal understanding had been reached between Cruse and the Commonwealth prior to or at the time of Cruse's testimony at trial. There being no evidence that defense counsel had any knowledge of or access to such information other than the revoked written plea agreement,[19] the Court will grant Williams an evidentiary hearing on this claim. The motion to dismiss will be denied.

[19] *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir.), *cert. denied*, 117 S.Ct. 630 (1996); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990).

5. Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court set forth the standard for determining whether a criminal defense lawyer has acted so egregiously as to deprive the defendant of his Sixth Amendment right to counsel. Petitioner must establish two elements: first, that counsel's performance was deficient; and second, that the deficient performance prejudiced the defendant. *See id.* at 687. This is an exacting standard: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relief on as having produced a just result." *Id.* at 686.

Under the first prong, the petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. In order to avoid the distorting effects of hindsight, however, the Court must evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. The Court "must [also] appreciate the practical limitations and tactical decisions that trial counsel faced." *Bunch v. Thompson*, 949 F.2d 1354, 1363 (4th Cir. 1991), *cert. denied*, 505 U.S. 1230 (1992). Rather than second-guessing decisions which are the result of trial tactics or strategy, the reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see also Williams v. Dixon*, 961 F.2d 448, 451 (4th Cir.), *cert. denied*, 506 U.S. 991 (1992); *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir. 1990), *cert. denied*, 501 U.S. 1223 (1991).

The second prong of the *Strickland* test, the "prejudice" inquiry, requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." 466 U.S. at 687. Accordingly, the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* Counsel's errors, even if unreasonable, must be shown to have "actually had an adverse effect on the defense." *Id.* at 693.

When analyzing ineffective assistance of counsel claims involving appellate counsel, the Fourth Circuit has held that appellate counsel are "entitled to a presumption that [they] decided which issues were most likely to afford relief on appeal." *Evans v. Thompson*, 881 F.2d 117, 125 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990). Furthermore, counsel are not obligated to assert all nonfrivolous issues. Rather, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from incompetence, is the hallmark of effective appellate advocacy." *Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990) (quotations and citations omitted).

The Virginia Supreme Court has considered and rejected the ineffective assistance of counsel claims discussed below. Under the new standard set forth in § 2254(d), this Court's review is limited to a determination of whether or not the Virginia Supreme Court's

resolution of these claims was a reasonable interpretation of the *Strickland* standard and other relevant U.S. Supreme Court precedent. However, this Court notes that the Virginia Supreme Court issued a one page summary order in Williams' state habeas petition.[20] Where the Virginia Supreme Court provides no insight as to the manner or reason by which it applied federal law to the facts of the case, a federal court must necessarily perform its own review of the record. The deferential standard mandated by § 2254(d)(1) has less meaning in this situation. *See Cardwell v. Netherland*, 971 F.Supp. 997 (E.D. Va. 1997).

Claim V(A)(1)

In his federal habeas petition, Williams argues that defense counsel's performance was constitutionally deficient because (1) counsel failed to object to the trial court's erroneous charge on the triggerman rule and the degrees of murder, and (2) counsel failed to preserve the claims regarding the trial court's refusal to give Williams' proposed Instructions #19 and #20.

On direct appeal, the Virginia Supreme Court, citing *Strickler v. Commonwealth*, 241 Va. 482, *cert. denied*, 502 U.S. 944 (1991), ruled that the trial court's Instruction #18 correctly stated the triggerman rule. *See Williams*, 248 Va. at 545. Under Virginia law, only the immediate perpetrator of a murder may be convicted of capital murder. *See*

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[20] Specifically, the Virginia Supreme Court held that it found "no merit in petitioner's remaining allegations" and ordered that Williams' state habeas petition be dismissed. Order Upon a Petition for a Writ of Habeas Corpus, issued by the Virginia Supreme Court, March 18, 1996.

Va. Code § 18.218; *Johnson v. Commonwealth*, 220 Va. 146, 150 (1979), *cert. denied*, 454 U.S. 920 (1981). "[W]here two or more persons take a direct part in inflicting fatal injuries, [however,] each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes." *Strickler*, 241 Va. at 495. Although there is conflicting evidence as to which shot actually killed the Kellers, Cruse's testimony and Williams' own testimony convincingly demonstrate that Williams played a "direct part in inflicting fatal injuries" and thus, is liable as an "immediate perpetrator" of the Kellers' murders. *See id.* That being the case, the Court finds that the trial court did not give an erroneous charge and that defense counsel did not perform ineffectively by failing to object.

As for defense counsel's failure to preserve the claims regarding the trial court's rejection of Williams' proposed instructions, the Virginia Supreme Court ruled that pursuant to *Jenkins v. Commonwealth*, 244 Va. 445, 460-61 (1992), *cert. denied*, 507 U.S. 1036 (1993), Williams had waived those claims because counsel merely "incorporate[d] by reference" the argument made in the trial court for consideration on appeal. *See Williams*, 248 Va. at 545. Assuming *arguendo* that counsel's performance was deficient in this regard, Williams must still demonstrate prejudice. He fails to do so in this case. The proposed instructions were not only a misstatement of Virginia law, but they directly contradicted the charge which was ultimately given to the Jury – a charge which the Virginia Supreme Court found to be a correct statement of Virginia law. Accordingly, the Court finds that Williams has failed to satisfy either prong of the *Strickland* test.

Claim V(A)(2)

Williams essentially argues that defense counsel failed to effectively impeach Cruse's testimony. Specifically, Williams takes issue with the following acts or omissions of defense counsel: (1) failure to object to leading questions; (2) failure to cross-examine Cruse on the rape of Mrs. Keller, his alleged breach of the plea agreement, his motives for testifying, his failure to take a polygraph examination as required by the plea agreement, the written plea agreement, his consumption of alcohol on the night of the murders, and his ability to recall the details of that night; (3) failure to interview Cruse or his lawyers regarding the nature, extent, or existence of a plea agreement; and (4) failure to interview law enforcement officers regarding the nature, extent, or details of any statements made by Cruse to law enforcement officers.

To rebut Williams' allegations, Respondent has submitted the unrebutted affidavit of Williams' defense counsel which was filed in the state habeas proceedings. Among other things, the affidavit details defense counsel's investigation into and preparation for Cruse's testimony. Specifically, defense counsel reviewed the Commonwealth's investigative file, Cruse's criminal record, Cruse's statements to the police, and Cruse's testimony at the preliminary hearings; interviewed the primary State Police investigator and the attorneys who represented Cruse at the preliminary hearings; and created a strategy to paint Cruse as "a person who repeatedly had lied to the police, and who, although he said he no longer had a plea agreement, was testifying the way he thought the prosecution wanted him to testify about

Williams' role in the offenses in order to save his own life." Resp't Federal Ex. D at 3. In light of defense counsel's representations, it appears that Williams' complaints amount to little more than second-guessing a trial strategy that did not work. Accordingly, the Court finds that Williams has failed to bear his burden of proving deficient performance and prejudice under *Strickland*.

Claim V(A)(3)

Williams claims that defense counsel were ineffective because they failed to investigate, develop, and present evidence of voluntary intoxication as a defense and to impeach his codefendant, Cruse, with evidence of his intoxication. Although Respondent addresses Williams' claim regarding intoxication as a defense, he argues that the claim regarding counsel's failure to impeach Cruse is defaulted because it was never raised in state court. The Court will address each contention in turn.

a. Intoxication as a Defense

The affidavit submitted by Williams' defense counsel belies his claim that they were ineffective in failing to mount a voluntary intoxication defense. In fact, the affidavit demonstrates that after a reasonable investigation, counsel determined that voluntary intoxication would not be a viable defense in Williams' case. Counsel based this conclusion on their multiple interviews with Williams in which he repeatedly gave "a consistent, coherent account" of the Kellers murders and Prince Edward County homicides; thorough research of Virginia law on

the issue of voluntary intoxication as a defense to premeditated murder; and Williams' own testimony at the guilt stage of trial. In counsel's opinion, Williams had the capacity for premeditation and the ability to act upon his plans, irrespective of the amount of alcohol or types of drugs he had consumed. Under *Strickland*, counsel's strategic decision to forego a voluntary intoxication defense after a reasonable investigation of that defense cannot be said to be so outside "the wide range of reasonable professional assistance[ ]" so as to constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 689.

b. Intoxication to Impeach Cruse

In his state habeas petition, Williams claimed ineffective assistance of counsel with respect to defense counsel's failure to argue intoxication to the jury as a basis for impeaching Cruse's testimony. In his federal habeas petition, Williams' claim is that defense counsel failed to cross-examine Cruse on the issue of intoxication. Respondent contends that the claims are distinct and having failed to present the latter in state court, Williams is barred from raising it on federal habeas review. The Court agrees.

Claim V(A)(4)

Williams premises this ineffective assistance of counsel claim on defense counsel's failure to object when the trial court allegedly omitted a jury charge on the Commonwealth's burden of proving beyond a reasonable doubt that Williams committed the crimes. Respondent contends that the record clearly refutes this claim.

During both the jury selection process and at the guilt stage, the trial court repeatedly informed the jurors that Williams was presumed innocent "and not guilty unless and until the Commonwealth proves each and every element beyond a reasonable doubt." *See, e.g.*, Tr. 1-3-94 at 20-21, 119-120, 155-56, 210-211, 264-265; 1-6-94 at 9. Furthermore, in the instructions listing the elements of each charged offense, the trial court stated that "the Commonwealth must prove beyond a reasonable doubt each of the following elements." Tr. 1-6-94 at 11-22. The trial court also instructed the jury that "[t]here is no burden on the defendant to produce any evidence." *See, e.g.*, Tr. 1-6-94 at 10.

Based on the foregoing, the Court is hard-pressed to find how defense counsel's performance could be deficient in this case when the record clearly shows that the trial court did instruct the jury on the burden of proof. Accordingly, the Court finds that Williams has failed to satisfy the *Strickland* test.

Claim V(A)(5)

Williams claims that defense counsel were ineffective on voir dire. Specifically, Williams argues that defense counsel failed to object to the trial court's alleged errors on voir dire, failed to rehabilitate three specific jurors, failed to object to confusing and misleading prosecutorial questions, failed to preserve the issue for appellate review, and failed to conduct extensive voir dire on the issue of pretrial publicity

a. Failure to Protect Right-to-Life Qualification Questions

1. & 2. Jurors Trent and Holman

The transcript of the jury selection proceedings reveals that Jurors Trent and Holman initially indicated that they could fairly consider giving the death penalty. Upon further questioning, however, Jurors Trent and Holman expressed serious reservations about imposing a death sentence regardless of the evidence presented and the instructions given by the court. Although the paper record is somewhat confusing as to the equivocal answers given by Jurors Trent and Holman, this Court is required to give deference to the state trial judge's findings of fact. *See* § 2254(e)(1). This Court must also refrain from second-guessing defense counsel's tactical decisions to not object to the prosecutor's questions, attempt further rehabilitation, or object to the exclusion for cause of Jurors Trent and Holman. Even assuming *arguendo* that defense counsel were deficient, Williams has failed to come forth with clear and convincing evidence to rebut the trial court's finding that Jurors Trent and Holman could not impartially consider imposing a death sentence. Accordingly, the Court finds that Williams has failed to satisfy the *Strickland* test.

3. Juror Bernard

Both the prosecution and the defense agreed to strike Juror Bernard for cause. Defense counsel's affidavit clearly demonstrates that counsel made a strategic decision to not object to the prosecutor's challenge for cause

because "we were of the opinion that, on balance, the juror's answers indicated she would be a pro-prosecution juror." Resp't Federal Ex. D at 2. Absent evidence to the contrary, the Court will not second-guess defense counsel's tactical decision. Furthermore, Williams has failed to demonstrate that except for counsel's failure to object to the removal of Juror Bernard for cause, there is a reasonable probability that the outcome of the proceeding would have been different.

b. Failure to Challenge Prospective Juror Stinnett for Cause

Respondent contends that this claim is barred from federal habeas review because it was never raised in state court. Williams argues, however, that this is Williams' first opportunity to present this claim because both the Commonwealth and Juror Stinnett withheld vital information on voir dire. Specifically, Juror Stinnett failed to reveal her former marriage to a prosecution witness, Deputy Sheriff Claude B. Meinhard who investigated the Keller murders; and the prosecutor failed to disclose that he had represented Deputy Sheriff Meinhard during his divorce proceedings.

Although the Court is troubled by these allegations, Williams has failed to demonstrate how defense counsel was deficient in failing to challenge Juror Stinnett for cause. Williams himself states that "*[i]f* counsel were aware to [sic] Stinnett's relationship to trial witness Meinhard, failed to reveal the relationship to Williams or to the court, and failed to move to strike Stinnett for cause, then counsel were ineffective under *Strickland* and

Williams was prejudiced." Pet'r Opp'n at 52 (emphasis added). Williams, however, has presented no evidence to establish that defense counsel actually knew of Juror Stinnett's former marriage to Deputy Sheriff Meinhard. Accordingly, the Court finds no basis for holding that defense counsel were ineffective in not questioning Juror Stinnett about matters of which counsel were completely unaware.

c. Failure to Conduct Extensive Voir Dire on the Issue of Pretrial Publicity

The Constitution guarantees criminal defendants a jury consisting of "impartial, indifferent" persons. *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (citation omitted). In this case, several local newspaper stories were published about Williams and his involvement in the Keller murders as well as the Prince Edward County murders in the months leading up to his trial. In light of this, Williams argues that defense counsel were constitutionally ineffective at voir dire by failing to determine whether individual jurors had been influenced by pretrial publicity to Williams' prejudice.

As a preliminary matter, the Court notes that defense counsel did move for a change of venue which the trial court denied. As to the voir dire process, the trial transcript reflects that the trial judge questioned all the prospective jurors as to their exposure to pretrial publicity. *See, e.g.*, Tr. 1-3-94 at 56-57, 75-76. In those instances where a prospective juror had been exposed to pretrial publicity, the trial judge pursued the issue of prejudice.

> Have any of you formed any opinion as to the guilt or innocence by virtue of what you have heard or read?
>
> . . . .
>
> Considering what you have read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before you reach any fixed opinion or conclusion concerning the guilt or innocence of the accused?

Tr. 1-3-94 at 57. The trial judge then followed up his questions concerning exposure to pretrial publicity with questions concerning preconceptions about Williams' guilt. The judge also inquired about prejudice against both Williams and the Commonwealth. Finally, the judge gave defense counsel an opportunity to examine the prospective jurors. Contrary to Williams' assertion, defense counsel did pursue those prospective jurors who had admitted to being exposed to pretrial publicity. *See, e.g.*, Tr. 1-3-94 at 67-68, 85-86.

Given that the trial court had already reached "the heart of the issue with respect to pre-trial exposure to publicity – that is, whether the [prospective jurors] had developed a fixed pre-conception,"[21] the Court finds that defense counsel's tactical decision to not conduct a more detailed voir dire did not prejudice Williams' rights in this regard. Accordingly, Williams has failed to satisfy both prongs of the *Strickland* test.

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[21] *Clanton v. Blair*, 619 F. Supp. 1491, 1501 (E.D. Va. 1985) (Merhige, J.)

Claim V(A)(6)

Prior to trial, Williams moved for the appointment of a private investigator to assist in investigating issues of mitigation evidence and a possible change of venue; the trial court denied the motion. On appeal, Williams argued that investigative assistance was required to investigate (1) Cruse's credibility and (2) the evidence of the Prince Edward County murders. Because these arguments were not presented to the trial court, the Virginia Supreme Court refused to consider the claim. *See Williams*, 248 Va. at 539. Williams now claims ineffective assistance of counsel on those grounds.

The Virginia Supreme Court has repeatedly held that an indigent capital defendant is not constitutionally entitled to the appointment of a private investigator. *See, e.g., Gray v. Commonwealth*, 233 Va. 313, 330 (1987); *Watkins v. Commonwealth*, 229 Va. 469, 478 (1985), *cert. denied*, 475 U.S. 1099 (1986). An indigent capital defendant is, however, entitled to be provided with "the basic tools of an adequate defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). This could include non-psychiatric experts if the defendant is able to make "a particularized showing of need for the assistance of such experts." *Husske v. Commonwealth*, 252 Va. 203, 211 (1996), *cert. denied*, 117 S. Ct. 1092 (1997).

In the instant case, Williams asserts that the discovery of a September 1993 psychological report on Cruse[22]

[22] Williams claims that the Commonwealth failed to disclose this report, which contained valuable *Brady* information, to defense-counsel. *See infra* Claim IV(A)(2).

is a prime example of information that would have been beneficial to Williams' defense, but that could not be discovered without an investigator. In the report, the consulting psychiatrist notes that Cruse has "little recollection of the event, other than vague memories[ ]" – information which would have been beneficial in challenging Cruse's trial testimony. Pet'r Ex. D. Respondent argues, however, that Williams is precluded by 28 U.S.C. § 2254(e)(2) from introducing this report in support of his federal habeas petition because it was never presented to the state courts in support of his state habeas petition.[23]

Although section 2254(e)(2) does not apply when a petitioner is denied the opportunity to develop a record in the state proceeding, Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded the same type of assistance at both state and federal habeas – namely, court-appointed attorneys. The Court can therefore discern no reason and has been offered no explanation why state habeas counsel failed to

[23] The applicable section of the statute provides that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows" and then provides limited exceptions. 28 U.S.C. § 2254(e)(2). Williams argues, however, that he did not "fail" to develop a factual basis in state proceedings; he was denied the tools necessary to do so by the Virginia Supreme Court. Section 2254(e)(2) does not apply when a petitioner attempts to develop a record in the state proceeding, but is denied that opportunity by the state court. *See Cardwell v. Netherland*, 971 F. Supp. 997 (E.D. Va. 1997).

discover the report and present it in state habeas proceedings. In light of this, Williams has failed to bear his burden of demonstrating that defense counsel were ineffective in failing to secure the appointment of an investigator, much less that there is a reasonable probability that the outcome of his trial would have been different.

Claim V(A)(7)

During the guilt phase, the Commonwealth presented the testimony of Mrs. Keller's mother and Mr. Keller's brother as a means of identifying the personal property taken from the Kellers' home. Prior to their testimony, defense counsel were apparently prepared to stipulate to the evidence. Williams argues that by failing to promptly do so, defense counsel allowed "unnecessarily emotional and inflammatory testimony" to be presented to the jury, thereby prejudicing his case. The Court finds, however, that Williams has failed to show that the stipulation, if accepted, would probably have changed the outcome of the trial. Accordingly, pursuant to *Strickland*, this claim must be dismissed.

Claims V(A)(8) & V(A)(9)

During the prosecution's arguments, defense counsel did not offer a single objection despite numerous instances in which the prosecutor allegedly misstated the evidence, interjected opinion, mischaracterized testimony, argued facts not in evidence, and made other improper arguments. Williams claims that he was, in

effect, without counsel during opening and closing arguments; thus, so he contends, defense counsel's performance was unconstitutionally deficient and he was prejudiced as a result.

Defense counsel state in their affidavit, however, that

> [a]s a matter of general strategy, we believe it is better not to object to a prosecutor's remarks or arguments to the jury unless absolutely necessary. Such objections run the risk of emphasizing adverse matters before the jury or giving the jury the impression the defense is trying to cover something up. In Michael Williams' case, we refrained from making such objections because, in our opinion, any such objections would have been overruled by the trial judge and the objections could have adversely affected our client in the jury's eyes.

Resp't Federal Ex. D at 4. Such a strategy appears reasonable and accordingly, did not render Williams' defense counsel constitutionally ineffective. Moreover, Williams has failed to show a reasonable probability that the outcome of either phase of the proceedings would have been different if defense counsel had made any or all of Williams' suggested objections.

Claim V(B)(1)

At the outset of the penalty phase, the Commonwealth called the mother of Mrs. Keller as a witness. Williams argues that her appearance was totally irrelevant and indeed, was "designed to elicit the juror's sympathy and arouse their anger against Williams." Pet'r Opp'n at 56. As a consequence, Williams claims that

defense counsel should have objected to her testimony and their failure to do so constitutes ineffective assistance of counsel.

On direct appeal, the Virginia Supreme Court assessed the testimony of Mrs. Keller's mother as follows: "[she] testified only as to her daughter's age and marriage to Mr. Keller and identified a photograph of the Kellers [as they appeared before their deaths]. The record does not disclose that [she] displayed any particular emotion during the short period of her testimony." *Williams*, 248 Va. at 548. Our review of the record concurs with this assessment.

The Court also agrees, however, with Williams' argument that the prosecutor could have argued the statutory aggravators based on previously admitted crime scene photographs which sufficiently depicted the vileness of the crime. Williams has not proferred [sic] any evidence, however, to establish that defense counsel's decision not to object on relevancy grounds was not a tactical decision. Moreover, Williams has failed to suggest any concrete evidence of prejudice as a result of his counsel's alleged deficient conduct. Accordingly, this claim must be dismissed.

Claim V(B)(2)

Williams argues that his defense counsel were ineffective in failing to timely object to photographs of the Prince Edward County victims and to properly argue the objection. The issue of the photographs arose during the Commonwealth's examination of the medical examiner, Dr. William Massello. Dr. Massello had been called to

identify the four victims of the Prince Edward County shootings and to establish their cause of death. In addition to the autopsy reports, the Commonwealth sought to introduce photographs of each victim's head[24] in order to establish "vileness." Defense counsel immediately objected and engaged in heated argument in the presence of the jury. The trial court finally admitted the photographs, but only after the Commonwealth changed the grounds for which they were offered – to establish "future dangerousness" and to corroborate the testimony of Williams' brother about the shootings. On direct appeal, the Virginia Supreme Court ruled that the photographs were properly admitted and rejected Williams' argument that the photographs need not be admitted because the same facts were contained in the autopsy reports.

Williams now argues that defense counsel were ineffective in failing to "foresee the inflammatory and prejudicial effect the Prince Edward photographs would have on the jurors and fail[ing] to object to their admission in advance of the medical examiner's testimony." Pet'r Opp'n at 57. The unrebutted affidavit submitted by defense counsel refuts [sic] this contention. *See* Resp't Federal Ex. D at 6. Moreover, as Respondent correctly notes, defense counsel did raise their objection to the photographs in a manner that was timely and specific enough to have the issue decided on appeal.

Even assuming that defense counsel's performance was deficient in failing to preempt the issue before it

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[24] The photographs graphically demonstrated that each victim had been shot in the head and that parts of each head had been subsequently burned. *Williams*, 248 Va. at 547.

reached the jury, Williams has not shown that there is a reasonable probability that the outcome of the penalty phase would have been different if counsel had succeeded in keeping the photographs out – the autopsy reports which explicitly described the wounds of the Prince Edward County victims were already before the jury. Nor has Williams demonstrated that raising the objection outside the presence of the jury would probably have changed the ultimate sentence. For these reasons, this claim must be dismissed under *Strickland*.

Claim V(B)(3)

In addition to failing to prevent the admission of the Prince Edward County photographs, Williams claims his defense counsel were ineffective on the grounds that they did not attempt to develop defense evidence and mitigating information through the medical examiner's testimony. Williams' brother, John, had testified that he, Williams, and the Prince Edward County victims had been drinking heavily on the night of the shootings. Williams now argues that defense counsel should have attempted to posit an explanation for the shootings by cross-examining Dr. Massello – specifically, that a drunken Williams had acted out of provocation or self-defense when threatened by an equally intoxicated man with a gun. Respondent argues, however, that defense counsel made "a deliberate, tactical decision not to cross-examine Dr. Massello" which should not be second-guessed on habeas review. Resp't Mot. to Dismiss at 50-51.

The affidavit submitted by defense counsel in the state habeas proceeding confirms Respondent's contention:

> We were thoroughly prepared for Dr. Massello's testimony at the penalty stage regarding the autopsies of the four Prince Edward County victims. We had reviewed all of the autopsy reports and Dr. Massello's testimony was consistent with those reports. We decided, as a matter of trial strategy, not to cross-examine Dr. Massello. Our strategy was to get Dr. Massello off the witness stand as quickly as possible. We did not want to ask him any questions which might result either in his using the photographs of the victims to illustrate his response or in the prosecution's using the photographs again on redirect. The photographs were very damaging to the defense and we simply did not want to run the risk of making a bad situation worse.

Resp't Federal Ex. D at 5-6.

Furthermore, there is no evidence that Williams was prejudiced by defense counsel's failure to cross-examine Dr. Massello and elicit information on levels of intoxication and time of death. In fact, a review of the trial transcript shows that Williams' proposed justification for shooting the Prince Edward County victims would not have been borne out by the evidence. Dr. Massello testified that Villalobos, the victim who allegedly provoked Williams, was shot "to the back of the right side of the head. . . . And as opposed to being a round hole, that you would expect a bullet to make, this is a very ragged, sort of star-shaped appearing wound, and this is from the effects of *the muzzle of the gun being held in contact with the*

head at the time of discharge. . . . " Tr. 1-6-94 at 109, 112-13 (emphasis added). The other victims were also shot at fairly close range. *See, e.g.*, Tr. 1-6-94 at 128. In the face of evidence which clearly contradicts Williams, self-defense argument, the Court finds that Williams was not prejudiced by defense counsel's decision to not call further attention to Dr. Massello's damaging testimony.

Claim V(B)(4)

Williams also claims ineffective assistance of counsel with respect to defense counsel's failure to cross-examine his brother, John. Although John testified that he had passed out prior to the shootings and thus did not know anything about the shootings other than what his brother had confessed to him, Williams argues that defense counsel could have elicited favorable evidence relating to the issue of self-defense. Furthermore, Williams claims that defense counsel could and should have humanized him by questioning John as to Williams' concern for John on the night of the shooting, Williams' remorse over the shooting of one of the victims, and John's own willingness to help his brother.

Again, the affidavit demonstrates that defense counsel made a deliberate, tactical decision not to cross-examine John.

> [H]is testimony regarding what the defendant had told him about the Prince Edward homicides was a more favorable version of the event than what the defendant had told us. Johnny was a reluctant prosecution witness and it was our impression that the prosecution had not succeeded on direct examination in eliciting from

> him all the information it had hoped to elicit. . . . [W]e did not want to risk inadvertently eliciting such adverse information on cross-examination or giving the prosecution another chance to do so on redirect. Resp't Federal Ex. D at 6. Absent evidence to the contrary, the Court does not find that defense counsel acted unreasonably. Under *Strickland*, this claim must be dismissed.

Claim V(B)(5)

Williams claims that defense counsel were ineffective for failing to object when the prosecutor cross-examined Williams' mother and maternal grandfather about the events leading to Williams' arrest. On direct examination, defense counsel had questioned Williams' mother about family history and Williams' learning disabilities, drug abuse, and other problems; Williams' grandfather was called to testify about Williams' strong work ethic and positive relationships with family members. On cross-examination, however, the prosecutor focused exclusively on Williams' arrest and the role of Williams' mother in persuading her son to surrender – topics clearly beyond the scope of direct examination. Defense counsel then failed to conduct any redirect examination to rehabilitate these mitigation witnesses.

In their affidavit, defense counsel state that it would have been futile to object: "such an objection certainly would have been overruled on the grounds that the Commonwealth was entitled to cross-examine the witnesses on the issue of bias." Resp't Federal Ex. D at 6. The Court agrees with Williams, however, that "effective representation requires that counsel make appropriate objections to

limit harmful evidence at trial and to preserve that issue for further appellate review." Pet'r Opp'n at 60. Counsel's prediction that their objection might be overruled by the trial court does not excuse their failure to object to obviously improper cross-examination.

As arguably deficient as defense counsel's performance may have been in this regard, however, Williams has not alluded to any prejudice whatever arising from defense counsel's omission. There is no evidence that the outcome of the penalty phase would probably have been different had defense counsel objected. Williams has thus failed to meet the "prejudice" prong of the *Strickland* test, and the instant claim must be dismissed.

Claim V(B)(6)

Williams argues that defense counsel were ineffective in failing to present evidence of his drug and alcohol abuse as a mitigating factor during the sentencing phase. Evidence at the guilt phase established that Williams had been drinking heavily on the night of the Keller murders and the Prince Edward County shootings. Evidence at the penalty phase further established that Williams had an extensive history of drug and alcohol abuse. Defense counsel did not, however, argue Williams' state of mind, the effect of Williams' drug and alcohol intoxication at the time of both the Keller and Prince Edward County murders, or the effect of drug and alcohol use on Williams who suffers from Attention Deficit and Hyperactivity Disorder ("ADHD"). Once again, defense counsel's affidavit provides an explanation for this alleged deficiency.

Defense counsel assert that "[i]t was our strategy not to assert [Williams'] intoxication at the time of the crimes as an excuse for his actions, but rather as part of a continuing symptom of his overall disorder." Resp't Federal Ex. D at 5. A review of the record confirms that defense counsel pursued this strategy throughout the penalty phase. Through the testimony of Dr. Dewey Cornell, the clinical psychologist appointed to assist the defense, defense counsel established that Williams suffered from ADHD and elicited information on the negative effects that drug and alcohol abuse have on a person with ADHD. Defense counsel also called members of Williams' family to testify about Williams' learning disabilities and continuing drug addiction. And contrary to Williams' assertion, defense counsel did argue Williams' intoxication at the time of the Keller and Prince Edward County murders on summation, albeit not in as much detail as Williams would have liked. Given the fact that it is "common knowledge that many find it difficult to view the illegal use of narcotics under any circumstances as a mitigating factor,"[25] the Court cannot say that counsel's performance was unreasonable.

Although it is tempting to opine in hindsight what defense counsel could and should have done at the sentencing phase, that is not the province of this Court. It is Williams' burden to demonstrate both deficient performance and prejudice from defense counsel's alleged

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[25] *Woomer v. Aiken*, 856 F.2d 677, 684 (4th Cir. 1988), *cert. denied*, 489 U.S. 1091 (1989).

mishandling of the issue of his drug and alcohol intoxication. Williams has not done so and thus, the claim must be dismissed.

Claim V(B)(7)

Williams next argues that defense counsel failed to protect the testimony of his mitigation expert, Dr. Cornell, from numerous objections and interruptions by both the prosecutor and the trial court. Other than the conclusory allegation that "[c]ounsel was wholly ineffective in addressing these issues," however, Williams has not provided any concrete evidence of deficient performance. On the contrary, the trial transcript clearly shows that defense counsel did respond, often times vigorously, to the prosecutor's attempts to limit Dr. Cornell's testimony. Defense counsel also challenged the trial court when it sought to advance the mitigation presentation. In light of this, the Court finds that Williams has failed to overcome the strong presumption that defense counsel's performance in presenting Dr. Cornell's testimony fell within the wide range of professionally competent performance. Moreover, Williams offers nothing more than mere speculation as to the prejudicial effect of defense counsel's conduct on his-case. Under *Strickland*, more is required; this claim therefore fails.

Claim V(B)(8)

Williams claims ineffective assistance of counsel based on defense counsel's failure to request an evaluation of Williams by a neuropsychologist to determine whether he suffered from brain dysfunction. In the state

habeas proceeding, Williams submitted the affidavit of a neuropsychologist, Dr. Robert Hart, who, after reviewing the testimony and evidence presented at trial, concluded that there was an indication of possible brain dysfunction which clearly required a thorough neuropsychological examination. Williams now contends that defense counsel's failure to pursue such an examination constitutes deficient performance and prejudiced his case.

Defense counsel responds, however, that they thoroughly consulted with Dr. Cornell, their mitigation expert who was familiar with the field of neuropsychology, and specifically discussed the possibility of organic brain dysfunction. Specifically, defense counsel state in their affidavit that:

> Dr. Cornell never indicated to us that further testing or evaluation was necessary or advisable. We specifically discussed with Dr. Cornell whether Michael Williams had organic brain damage because we were aware, and Dr. Cornell was aware, that at the time of Michael's birth there had been complications which reportedly had resulted in Michael not breathing for a period of time. Dr. Cornell, however, informed us that he had performed his own tests, including several standard neuropsychological tests, and satisfied himself that no further testing was indicated.
>
> . . . If Dr. Cornell had informed us that further evaluation was necessary or advisable, we would have requested the trial judge to authorize such an evaluation.

Resp't Federal Ex. D at 7-8.

Regardless of whether Williams believes that Dr. Cornell's neuropsychological assessment was inadequate, Williams has failed to prove that defense counsel's conduct was so objectively unreasonable as to constitute deficient performance. *See, e.g., Pruett v. Thompson*, 996 F.2d 1560, 1573-74 (4th Cir.), *cert. denied*, 510 U.S. 984 (1993). Defense counsel asked other members of the criminal defense bar to recommend a mitigation expert who would begin an evaluation on Williams' side; provided Dr. Cornell with all of the relevant information concerning the crimes and Williams' life history; and consulted with Dr. Cornell on numerous occasions prior to trial. Based on the foregoing, the Court finds that Williams received effective assistance of counsel within the meaning of *Strickland*.

Claim V(B)(9)

During the penalty phase, defense counsel elected not to put Williams on the stand. Williams now claims that had he testified, defense counsel could have elicited beneficial mitigation and rebuttal evidence which would have provided the jury with a reason for imposing a life sentence. Williams asserts that this failure to present his testimony demonstrates the absence of any defense strategy because "there was simply no advantage to a decision to withhold his testimony at the sentencing phase given the magnitude of the crimes involved." Pet'r Opp'n at 65.

Defense counsel's affidavit belies this contention. The record reveals that defense counsel discussed the issue of testifying with Williams several times before trial, mid-

trial, and the night before he testified at the guilt stage. Counsel repeatedly advised Williams of all the benefits and risks involved in testifying, and informed Williams that the ultimate decision was his to make. Only after viewing Williams' performance on the witness stand at the guilt stage – in particular, his "very cold" demeanor – did defense counsel decide not to call him during the penalty phase and risk subjecting him to damaging cross-examination about the Prince Edward County shootings. *See* Resp't Federal Ex. D at 9. Under these circumstances, the Court is hard-pressed to find how defense counsel's performance could be deemed ineffective.

Claim V(B)(10)

At the conclusion of the penalty phase, the trial court failed to instruct the jury as to the nature and use of the mitigation evidence presented by Williams. Williams now claims that defense counsel's failure to object to the allegedly deficient jury instructions and to request a corrective mitigation instruction deprived him of effective assistance of counsel. As discussed previously with respect to Claim VII(A), however, the Fourth Circuit has routinely held that penalty stage instructions beyond the standard Virginia sentencing instruction are not constitutionally required, particularly on the issue of mitigation. *See, e.g., Buchanan v. Angelone*, 103 F.3d 344, 347-48 (4th Cir. 1996) (holding that "Virginia's death penalty scheme survives constitutional scrutiny, despite its 'failure to instruct the jury on statutory mitigating factors' ") (citation omitted); *Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992); *Clozza v. Murray*, 913 F.2d 1092, 1005 (4th Cir. 1990), *cert. denied*, 499

U.S. 913 (1991). Thus, defense counsel's conduct cannot be said to be deficient in this regard.

Claim V(B)(11)

For the reasons stated above with respect to Claims V(A)(8) and V(A)(9), this claim is likewise dismissed under *Strickland*.

Claim V(B)(12)

Williams claims that defense counsel presented ineffective argument at the penalty phase and failed to provide the jury with persuasive reasons to impose a sentence of life rather than death. Contrary to Respondent's assertion, Williams does specify those mitigating factors that defense counsel did not argue or argued ineffectively as well as those arguments that harmed Williams' case. *See* Pet. at 145-46. After reviewing the trial transcript, however, the Court does not find that defense counsel's argument was so lacking as to fall below the wide range of professionally competent performance.

In closing argument, counsel did discuss Williams' history of drug and alcohol abuse; traumatic events in his life, including sexual abuse and an unstable home; ADHD and its effect on Williams; his loving and close relationship with his family; and his intoxication on the night of the Keller murders and Prince Edward County shootings. Counsel also stressed that the jury had the option of imposing a life sentence regardless if they found either of the statutory aggravating factors and that there was enough hope for Williams that the jury should

impose a life sentence. *See* Tr. 1-7-94 at 208-212, 215-24. Absent post hoc rationalization, the Court cannot say that defense counsel's conduct was objectively unreasonable under *Strickland*.

Claim V(B)(13)

As a final matter, Williams claims that defense counsel's errors at the sentencing phase individually and collectively prejudiced his case. Aggregating alleged errors that themselves do not constitute ineffective assistance is not sufficient to meet the stringent standard under *Strickland*. *See Thomas-Bey v. Smith*, 869 F. Supp. 1214, 1230-31 (1994), *aff'd*, 67 F.3d 296 (4th Cir. 1995). Accordingly, this claim must be dismissed.

Claim V(C)(1)[26]

Williams claims that defense counsel, who were also appellate counsel, rendered ineffective assistance by failing to properly appeal the denial of proposed Instructions #19 and #20 to the Virginia Supreme Court. *See infra* Claim V(A)(1). Specifically, because appellate counsel merely " 'incorporate[d] by reference' the argument he made in the trial court," the Virginia Supreme Court refused to consider the claim on appeal. *Williams*, 248 Va.

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[26] Respondent concedes that Claim V(C)(1) was raised in Williams' state habeas petition and dismissed by the Virginia Supreme Court on the grounds that it was without merit. *See* Resp't Reply at 26.

at 545. Williams argues that this omission of "an obviously winning issue" constitutes ineffective assistance of counsel on appeal. Pet. at 148.

As discussed previously with respect to Claim V(A)(1), however, assuming *arguendo* that counsel's performance was deficient in this regard, Williams must still demonstrate prejudice. Although the Court agrees that Williams is not required to demonstrate that the omitted claim would have resulted in a reversal on appeal, Williams must demonstrate that there is a reasonable probability that the outcome of the appeal would have been different. Given the Virginia Supreme Court's determination that the trial court's Instruction #18 was a correct statement of Virginia law, counsel's failure to properly appeal the issue would not have changed the outcome. Thus, the Court finds that Williams was not denied effective assistance of appellate counsel.

Claim V(C)(2)[27]

Williams next argues that counsel failed to properly preserve objections or properly frame its appeal of the trial court's erroneous restrictions of voir dire. Rather than specifically appeal the trial court's restrictions on questions concerning juror attitudes about the death penalty, counsel appealed the trial court's general denial of expanded voir dire. Williams argues that the failure to

[27] Respondent concedes that Claim V(C)(2) was raised in Williams' state habeas petition and dismissed by the Virginia Supreme Court on the grounds that it was without merit. *See* Resp't Reply at 26.

properly frame the issue under applicable U.S. Supreme Court precedent constituted ineffective assistance of counsel. Assuming *arguendo* that counsel was deficient in this regard, Williams has not demonstrated that there is a reasonable probability that the direct appeal decision would have come out any differently had counsel appealed the issue with more specificity. Accordingly, this claim must be dismissed.

Claim V(C)(3)

Williams' final claim is that appellate counsel failed to properly appeal the trial court's refusal to strike Juror Davis. At trial, defense counsel objected to Juror Davis on the ground that he strongly favored the death penalty. On direct appeal, however, appellate counsel proposed a different argument – namely, that the trial court applied the wrong disqualification standards. Noting that the latter objection was not made in the trial court, the Virginia Supreme Court dismissed the claim pursuant to its Rule 5:25. *See Williams*, 248 Va. at 540.

Whether appellate counsel should have narrowly tailored the appeal regarding juror exclusion to the treatment of each individual juror, the Court is not persuaded that counsel's failure to do so does falls [sic] outside the wide range of objectively reasonable performance. Given that Williams has alleged that the trial court treated Jurors Trent, Holman, Bernard, and Davis differently, it is not unreasonable for appellate counsel to have framed the appeal in such terms as would encompass the trial court's allegedly erroneous treatment of all these jurors.

The Court also notes that the state trial judge found Juror Davis to be impartial; this Court is required to give deference to that finding of fact. *See* § 2254(e)(1). In the absence of clear and convincing evidence to rebut the trial court's finding that Juror Davis could impartially consider imposing a life or death sentence, the Court finds that Williams has failed to establish prejudice resulting from appellate counsel's failure to litigate this specific claim on appeal. Under *Strickland*, this claim must be dismissed.

VII. CONCLUSION

Respondent's Motion to Dismiss the petition will be GRANTED IN PART AND DENIED IN PART. An Evidentiary Hearing will be GRANTED with respect to Claims I(A), IV(A)(1), and IV(A)(5).

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DATE: April 13, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

Civil No. 3:96-CV-529

v.

J.D. NETHERLAND,
Warden, Mecklenburg Correctional Center,

Respondent.

MOTION FOR LEAVE TO INVOKE DISCOVERY

The petitioner, Michael Wayne Williams ("Williams"), by counsel, pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts, moves for entry of an order granting leave to invoke discovery. Williams seeks leave to serve subpoenas *duces tecum* and to take the depositions of individuals who have information relating to the claims on which the Court has granted an evidentiary hearing. The hearing is scheduled on May 18, 1998. In support of this motion, Williams submits the following:

This Court's Order entered on April 13, 1998 granted Williams an evidentiary hearing on Claims I(A) (Juror Misconduct) and Claims IV(A)(1) and IV(A)(5) (Prosecutorial Misconduct).

In Claim I(A) Williams asserts that he was deprived of his due process right to a fair trial because Ms. Stinnett, the jury forewoman, failed to disclose at *voir dire* that her former husband was Deputy Sheriff Meinhard, one of the Commonwealth's witnesses at Williams' trial. Meinhard was the detective who interviewed Williams' co-defendant and chief accuser, Jeffery Cruse. Claim IV(A)(5) is a related claim, in which Williams asserts that the Commonwealth's Attorney also improperly failed to disclose the connection between the Commonwealth's witness, Deputy Meinhard, and juror Stinnett.

In Claim IV(A)(1) Williams asserts that the Commonwealth improperly failed to disclose its plea agreement or understanding with Cruse, the chief prosecution witness, thereby depriving Williams of due process and a fair trial.

Rule 6(a) vests this Court with the discretion to grant discovery in habeas cases where "good cause" is shown. Federal courts have adopted the "good cause" standard established in *Harris v. Nelson*, 394 U.S. 286 (1969), even though *Harris* was decided before the enactment of Rule 6. *See, e.g., Gilday v. Callahan*, 99 F.R.D. 308 (D. Mass. 1983). *Harris* holds that discovery is appropriate in habeas cases if it relates to specific claims as to which the Court concludes that the petitioner may prevail, if given the opportunity to further develop the facts relating to such claims. Williams submits that he has met the "good cause" requirement for discovery relating to Claims I(A), IV(A)(1) and IV(A)(5) by virtue of this Court's Order granting a hearing on those claims.

The discovery Williams requests is directly related to the claims which will be the subject of the May 18, 1998

hearing. Williams seeks leave to issue subpoenas *duces tecum* to the Commonwealth's Attorney, to the Sheriff of Cumberland County, and to the lawyers who represented Jeffrey Cruse seeking the production of documents relating to any plea agreement or understanding between the Commonwealth and Cruse. *See*, Statement of Materials Requested, attached as Exhibit A, ¶ 2. Such materials relate directly to Claim IV(A)(1).

Williams also seeks leave to subpoena documents from the Commonwealth's Attorney and the Sheriff of Cumberland County relating to the jury panel for Williams' trial. *See* Exhibit A, ¶ 1. Such documents relate directly to Claim IV(A)(5).

Williams seeks leave to issue deposition subpoenas to Ms. Stinnett, Sheriff Meinhard and the Commonwealth's Attorney for the purpose of discovery relating to Claim I(A) (Juror Stinnett's failure to disclose her relationship to Deputy Sheriff Meinhard) and Claim IV(A)(5) (the Commonwealth's Attorney's failure to disclose the Stinnett-Meinhard relationship). *See* Deposition Subpoenas, attached.

Williams seeks leave to issue deposition subpoenas to the Commonwealth's Attorney and to counsel for Jeffrey Cruse for the purpose of discovery relating to Claim IV(A)(1) (the Commonwealth's failure to disclose its plea agreement or understanding with Cruse). *See* Deposition Subpoenas, attached.

Conclusion

For the reasons stated, this Court should grant Williams' Motion for Leave to Invoke Discovery.

MICHAEL WAYNE WILLIAMS

By: /s/ Illegible
Counsel

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, Virginia 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
Hill B. Wellford, III, VSB #38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4127

[Certificate Of Service Omitted In Printing]

EXHIBIT A

STATEMENT OF MATERIALS REQUESTED
RELATING TO CLAIMS I(A), IV(A)(1) AND IV(A)(5).

1. All documents including notes, letters, memoranda, or any other written memorializations relating to the jury panel and/or the jury selection process in the case of *Commonwealth v. Michael Wayne Williams*.

2. All documents, whether public, privileged or under seal, including notes, letters, memoranda, or any

other written memorializations relating to (1) the testimony of Jeffrey Cruse at trial in the matter of *Commonwealth v. Michael Wayne Williams*, (2) any consideration offered or given for his testimony, (3) any agreements or understandings, formal or informal, between Cruse and/or his counsel and any representative of the Commonwealth relating to his testimony and/or the disposition of any then pending criminal charges filed against Cruse. If any document identified pursuant to this request is claimed to be privileged, provide a description of the document, the author of the document, the addresses(s) or recipients(s) of the document, the date of the document and the basis for the privilege claim. If any document identified pursuant to this request is claimed to be under seal, identify the date of the document, the date of the court order sealing the document, the jurisdiction entering the order, and the style and case number of the case in which the order sealing such document was entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,	)	
Petitioner,	)	Civil Action No. 3:95CV924
v.	)	
J.D. NETHERLAND, Warden,	)	
Respondent.	)	

PETITIONER'S MOTION TO ALTER OR AMEND THE COURT'S JUDGMENT OF APRIL 13, 1998, AND MEMORANDUM IN SUPPORT.

Petitioner, through counsel, moves the Court, pursuant to Fed. R. Civ. P. 59 (e) , to alter or amend its Order of April 13, 1998, and states as follows:

The Court granted petitioner an evidentiary hearing on Claims I(A) , IV(A) (1) , and IV(A) (5), and dismissed all remaining claims as procedurally barred or meritless. Without waiving any argument that all the dismissed claims should be heard, petitioner herein moves the Court to reconsider its ruling on Claims III(A)(1), III(A)(8), IV(A)(2), V(A)(1) and VII(G). For the reasons set forth below, petitioner respectfully maintains that the Court erred in dismissing these claims.

* * *

CLAIM IV(A)(2): The Commonwealth Failed To Disclose A Psychiatric Evaluation Of Cruse Containing Brady Material

The Commonwealth failed to disclose a psychiatric evaluation of the co-defendant, Cruse, in which Cruse admitted that he had "little recollection of [the Keller murders.]" Cruse was the only eyewitness to the Keller homicides and testified that Williams had fired all but one shot killing both victims. This Court held that the Commonwealth had violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), and that Williams was clearly prejudiced given the importance of Cruse's testimony. However, the Court held that petitioner had not demonstrated cause for his default. Opinion at 30-32.

Petitioner contends that this Court wrongly concluded that petitioner had failed to demonstrate cause for his failure to raise this claim in state court. In reaching this conclusion, the Court observed that although Williams had court-appointed attorneys in both state habeas and federal habeas, Williams had failed to state why the *Brady* claim could not be raised in state court. The Court has inadvertently overlooked petitioner's pleading on this issue. On March 10, 1997, in "Petitioner's Response To Warden's Reply Of February 21, 1997," petitioner explained how he was able to develop the bases for additional claims in federal court:

> Respondent reasons that Williams presented new claims in federal court, thus they must have been available in state court. Respondent willfully overlooks the fact that Williams' federal appointed counsel, unlike his state habeas counsel, were willing and financially able to fund a

> limited investigation on Williams's behalf [footnote omitted]. Because state habeas counsel was unable or unwilling to make the same personal financial commitment, and the state court would not provide funds for necessary services, the new claims now presented in Williams' federal petition were not reasonably available to Williams in state court.

Id. at page 6. In March 1997, petitioner had a motion for expert assistance pending before this Court so he could "develop and discover evidence further supporting the various claims . . . in his petition." *Ibid.* The Court later denied that motion.

The limited investigation funded by current federal counsel uncovered Cruse's psychiatric report when the investigator reviewed all known files on Cruse. Although state habeas counsel had examined the relevant files when preparing the state habeas petition, the psychiatric report at issue was not there. *See* Attachment I.[2] Given the nature and contents of the report, it is apparent that the report had been misplaced or misfiled as it should have been under seal. Current appointed counsel were, and remain, unable to fund a complete investigation on Williams' behalf. *No* expert assistance under 21 U.S.C. sec. 848(q) has been provided to Williams. Thus, additional evidence of *Brady* violations may exist, although counsel is unable to produce them.

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[2] The original, notarized affidavit will be filed with the Court this week. A faxed copy of the affidavit is attached here.

Petitioner's efforts in state court to develop the evidence for a *Brady* claim concerning Cruse were successfully opposed by the Commonwealth at every turn. State habeas counsel, Eric White, wrote both the Commonwealth's Attorney who tried the case and Respondent's counsel, Donald Curry, on October 30, 1995, and requested "all materials and evidence in the possession, custody or control of the Commonwealth or its agents pursuant to the principles of *Kyles/Brady* that are material to the issues of Williams' guilt or sentence for capital murder." Attachment A at 2.

White specifically requested:

> 1.(a) All reports of physical or mental examinations, scientific tests, or experiments conducted in connection with the investigation of the offense . . . ;
>
> 1.(b) All psychological test[s] or polygraph examinations performed upon any prosecution witness and all documents referring or relating to such tests;
>
> * * *
>
> **9. A copy of all medical and psychiatric reports known to the prosecutor concerning any witness the prosecutor called at trial which arguabl[y] affected the witness's credibility, ability to perceive, or relate or recall events.**

See Attachment A at 2-3, 4.

White also requested permission to review the investigative files of the Cumberland County Sheriff's Office and the Prince Edward County Sheriff's Office. Attachments B1 and B2. On November 1, 1995, Respondent's

counsel replied to White and stated that he would not review the Commonwealth's materials for exculpatory or impeachment material as requested.[3] "I know of no authority that requires the Commonwealth, as respondent in a civil habeas proceeding, to comply with such a request from petitioner's counsel." Attachment C at 1, ¶ 3. Current counsel made the same request when preparing Williams' federal petition and received the same response. *See* Ex. F to Petitioner's Opposition to Respondent's Motion To Dismiss, filed on Feb. 3, 1997.

* * *

CONCLUSION

For the reasons stated, this Court should reconsider its ruling on the above claims and grant petitioner relief or, in the alternative, an evidentiary hearing.

Respectfully submitted,

MICHAEL WAYNE WILLIAMS
By: /s/ Barbara L. Hartung

Barbara L. Hartung,
VSB 38062
1001 East Main Street
Suite 504
Richmond, VA 23219
(804) 649-1088

---

[3] Respondent's position is in conflict with *Mooney v. Holohan*, 294 U.S. 103, 108 (1935), *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976), *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992), and the Rules of the Virginia Supreme Court [DR 8-102(4), EC 8-10].

James E. Moore,
VSB 14526
Theodore Adams, III,
VSB 26708
Hill B. Wellford, III,
VSB 38938
Christian & Barton, L.L.P.
909 East Main Street,
Suite 1200
Richmond, VA
23219-3095
(804) 697-4100

Virginia Capital
Representation
Resource Center
P.O. Box 506
1001 East Main Street
Richmond, VA
23204-0506
(804) 643-6845
Counsel for Petitioner

April 27, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

v. Civil Action
No. 3:96CV529

J.D. NETHERLAND, Warden,
Respondent.

COMMONWEALTH OF VIRGINIA
COUNTY OF HENRICO

AFFIDAVIT OF ERIC D. WHITE

Eric D. White, having first been sworn, states as follows:

1. On August 10, 1995, I was appointed to represent Michael Wayne Williams in his state habeas corpus proceeding.

2. Prior to filing Mr. Williams' habeas corpus petition with the Virginia Supreme Court, I reviewed the Cumberland County court files of Mr. Williams and of his co-defendant, Jeffrey Cruse.

3. I am certain that I examined Mr. Cruse's court file for the following reason. The file did not contain a transcript of his guilty plea, and I later wrote the circuit court requesting a copy of the transcript.

4. I have reviewed the attached psychiatric evaluation of Jeffrey Cruse, dated September 14, 1993, prepared by Dr. Mario Gomez. I have no recollection of seeing this report in Mr. Cruse's court file when I examined the file.

Given the contents of the report, I am confident that I would remember it.

5. If I had seen the report, I would have included a *Brady* claim in Mr. Williams' state habeas petition based on this report.

/s/ Eric D. White
ERIC D. WHITE

Subscribed and sworn to before me this ____ day of April, 1998:

_____
NOTARY PUBLIC

My Commission expires: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

[Caption Omitted In Printing]

AFFIDAVIT

1. My name is Bonnie Stinnett. I was a juror in the capital murder trial of Michael Wayne Williams that took place in Cumberland County Circuit Court in January of 1994.

2. I married Claude Meinhard in 1962. During our marriage, we had four children. We divorced in 1979. Since our divorce, Claude and I have occasion to speak only one or two times a year.

3. When I was being asked questions by the Judge in court prior to being selected for the jury, I was asked whether I was related to any of the persons who were going to be called as witnesses in the case. One of the witnesses the judge mentioned was Deputy Sheriff Claude Meinhard. I did not respond to the judge's question because I did not consider myself "related" to Claude Meinhard in 1994, just as I don't consider myself "related" to him now. The only time I have been related to Claude, as far as I'm concerned, was during the years we were married. Once our marriage ended in 1979, I was no longer related to him.

4. I have *never* spoken to Claude Meinhard about the Michael Wayne Williams case. The fact that he was a witness in the case made no difference to me one way or the other, and certainly didn't cause me to favor the Commonwealth or the defendant.

5. I also was asked by the judge whether I or any member of my immediate family had ever been represented by any of the attorneys in the case. I did not respond to this question for several reasons. First, I do not think of myself as ever having been "represented" by an attorney for any reason. When Claude and I divorced in 1979, the divorce was uncontested and Mr. Woodson drew up the papers so that the divorce could be completed. Since neither Claude nor I was contesting anything, I didn't think Mr. Woodson "represented" either one of us. Second, even if someone had told me at the time of trial that Mr. Woodson had represented Claude, I still do not think that I would have responded to the judge's question because after being divorced for almost 15 years at the time I certainly did not consider Claude to be a member of my immediate family.

6. I tried my best to answer all of the judge's questions accurately. I also tried my best to be a good juror and to give the defendant a fair trial.

/s/ Bonnie Stinnett
Bonnie Stinnett

Subscribed and sworn to before me by Bonnie Stinnett this 27th day of April, 1998

/s/ Jennifer S. Turner
Notary Public

My commission expires: March 31, 2000
[I was commissioned as Jennifer Anne Sam.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

[Caption Omitted In Printing]

AFFIDAVIT

1. My name is Robert G. Woodson, Jr. I was the Commonwealth's Attorney in Cumberland County from 1989 to 1995. I prosecuted both Michael Williams and Jeffrey Cruse for capital murder in 1994. I presently am a General District Court judge in the 10th Judicial District.

2. At the time of the jury selection process in the Michael Williams case, I was aware that Juror Bonnie Stinnett was the ex-wife of then Deputy Sheriff Claude Meinhard and I was aware that they had been divorced for some time. I have no specific recollection of Juror Stinnett being asked whether she was "related" to any of the witnesses in the case, but I have been informed that the transcript shows that she was asked the question and that she did not respond even though "Deputy Sheriff Claude Meinhard" was recited as one of the expected witnesses. If I had heard such a question, however, I would not have expected her to state that she was "related" to her ex-husband. To my mind, people who are related only by marriage are no longer "related" once the marriage ends in divorce. Thus, I do not consider Juror Stinnett's failure to respond to the question to have been irregular in any way.

3. Until I was asked about the matter in April of 1998 by the Attorney General's Office, I had no recollection of having been involved as a private attorney in the

divorce proceedings between Claude Meinhard and Bonnie Stinnett. Even after having been shown the divorce decree with my name on it, I still have no independent recollection of the divorce case. In all likelihood, one or both of them came to me and simply asked me to draw up the papers for an uncontested divorce decree. Whatever my involvement was in the 1979 divorce, by the time of trial in 1994 I had completely forgotten about it.

/s/ Robert G. Woodson, Jr.
Robert G. Woodson, Jr.

Subscribed and sworn to before me by Robert G. Woodson, Jr. this 27th day of April, 1998.

/s/ Illegible
Notary Public

My commission expires: 10-31-2001.

CHRISTIAN & BARTON
L.L.P.

ATTORNEYS AT LAW

[Addresses Omitted in Printing]

May 5, 1998

BY HAND

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Re: Michael W. Williams v. J.D. Netherland
Civil Action No. 3:96-CV-529

Dear Don:

This will confirm that you will contact Judge Woodson today and advise him that Barbara Hartung and I would like to meet with him regarding this case, as Judge Merhige suggested. Judge Merhige asked that we report back to him regarding this matter. We would like to advise him of Judge Woodson's position as soon as possible.

Yours very truly,

/s/ James E. Moore
James E. Moore

JEM/jct

cc: Barbara L. Hartung

431745.2

[SEAL]

COMMONWEALTH OF VIRGINIA

Office of the Attorney General

Richmond 23219

[Address Omitted In Printing]

May 5, 1998

James E. Moore, Esquire
Christian and Barton, L.L.P.
909 East Main Street
Richmond, Virginia 23219-3095

Re: *Williams v. Netherland*
Civil Action No. 3:96CV529

Dear Jim:

Today, I spoke to Judge Robert G. Woodson, Jr., and advised him that Michael Williams' counsel wished to speak with him about Williams' case. I also told Judge Woodson that I had informed Judge Merhige this morning that I had no objection to such an informal interview. Judge Woodson has informed me, however, that he already has given two affidavits concerning Williams' claims and that he declines the invitation to discuss the matter with Williams' counsel. By a copy of this letter, I am informing Judge Merhige of Judge Woodson's wishes.

Sincerely,

/s/ Don
Donald R. Curry
Senior Assistant Attorney General
Criminal Litigation Section

cc: Honorable Robert R. Merhige, Jr., Judge
Barbara Hartung, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,	)	
Petitioner,	)	Civil Action
	)	No. 3:96CV529
v.	)	
J.D. NETHERLAND, WARDEN,	)	
Respondent.	)	

ORDER

(Filed May 15, 1998)

Upon due consideration, and deeming it proper so to do, it is hereby ADJUDGED and ORDERED that:

(1) Having failed to demonstrate "good cause" for the discovery request, Petitioner's Motion For Leave To Invoke Discovery (Docket No. 103) is DENIED;

(2) Respondent's Motion For Summary Judgment (Docket No. 100) is CONTINUED UNDER ADVISEMENT;

(3) The evidentiary hearing currently scheduled for May 18, 1998, is continued until **9:30 a.m., Friday, May 29, 1998.** Counsel for each of the parties herein shall, by **1:00 p.m., May 26, 1998,** file Proposed Findings of Fact and Conclusions of Law with the Clerk of this Court; and

(4) Having reconsidered its rulings, the Court reaffirms its dismissal of Claims III(A)(1), III(A)(8), IV(A)(2), V(A)(1), and VII(G). Accordingly, Petitioner's Motion To Alter Or Amend (Docket No. 103) is DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

DATE: **May 15, 1998**

FILED: May 27, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-17
(CA-96-529-3)

In Re: FRED W. GREENE, Warden,
Mecklenburg Correctional Center,

Petitioner,

ORDER

On November 20, 1996, Michael Wayne Williams filed a petition for a writ of habeas corpus in federal court in the Eastern District of Virginia. On April 13, 1998, the district court dismissed most of Williams' claims but granted him an evidentiary hearing on three claims. That evidentiary hearing is scheduled to occur on June 2, 1998. The Commonwealth now seeks to prevent the district court from holding the evidentiary hearing by filing an application for an emergency stay and a petition for a writ of mandamus and prohibition with this court.

Both parties agree that Chapter 153 of the Antiterrorism and Effective Death Penalty Act (AEDPA) governs Williams' petition. AEDPA establishes certain limits on a court's ability to conduct an evidentiary hearing where an applicant has failed to develop the factual basis of a

claim in state court. In such cases, the court may hold an evidentiary hearing only if the claim satisfies two requirements. First, the claim must rely on either certain retroactive new rules of constitutional law or "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A). Second, the underlying facts must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* § 2254(e)(2)(B).

In granting the evidentiary hearing, the district court did not apply these requirements. Instead, it simply cited several pre-AEDPA cases to support its conclusion that defendant has demonstrated cause and prejudice. This, we believe, was error.

Accordingly, the warden's application for an emergency stay is granted and the matter is remanded for further proceedings. On remand, the district court must determine whether, under AEDPA, Williams is entitled to an evidentiary hearing on these claims. Until the district court has evaluated Williams' entitlement to an evidentiary hearing under the strict requirements of AEDPA, we believe it would be premature to act on any petition for a writ of mandamus and prohibition.

The warden's application for an emergency stay is granted and the matter remanded for further proceedings as set forth herein.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Williams. Judge Hamilton voted to deny the application and petition.

For the Court

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS, Petitioner,	)	
v.	)	Civil Action
J.D. NETHERLAND, WARDEN,	)	No. 3:96CV529
Respondent.	)	

ORDER

(Filed Jun. 3, 1998)

Upon due consideration, for the reasons stated in the Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that:

(1) The Court's Order, dated April 13, 1998, granting an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5) is VACATED;

(2) Petitioner's federal habeas petition is DISMISSED in its entirety;

(3) Respondent's Motion For Summary Judgment is DENIED AS MOOT;

(4) At the expiration of thirty (30) days, unless an appeal has been filed, let the Clerk return to the appropriate repository such records as the Court has received in reference to this cause;

(5) This action is dismissed with prejudice; and

(6) All remaining motions not previously ruled on by the Court are DENIED AS MOOT.

Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DATE: June 3, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Caption Omitted In Printing]

MEMORANDUM

This matter is before the Court on remand from the United States Court of Appeals for the Fourth Circuit. For the reasons which follow, the Court concludes that Petitioner Michael Wayne Williams ("Williams") is not entitled to an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Accordingly, the Court will VACATE its Order granting Williams an evidentiary hearing on these claims, and DISMISS Williams' federal habeas petition in its entirety.

I.

On April 13, 1998, this Court dismissed the majority of Williams' federal habeas claims, but granted an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Respondent J.D. Netherland, Warden of Mecklenberg [sic] Prison ("Respondent"), subsequently moved for summary judgment, arguing that this Court misapplied applicable federal law. The Court heard argument on the motion and took the matter under advisement. Respondent then moved the Court for a stay of its order requiring the evidentiary hearing, pending resolution by the Fourth Circuit of an Application For Emergency Stay and a Petition For A Writ Of Mandamus And Prohibition which Respondent filed the next day. On May 27, 1998, the Fourth Circuit granted Respondent's Application For An Emergency Stay and remanded the matter for further proceedings.[1]

II.

A. Applicability of 42 U.S.C. § 2254(e)(2)

In remanding the matter, the Fourth Circuit directed this Court to apply the requirements of 28 U.S.C. § 2254(e)(2) in evaluating whether Williams is entitled to an evidentiary hearing on his claims. *See* CA4 Stay Order (May 27, 1998) at 2. A section 2254 petition is ordinarily

---

[1] The Fourth Circuit withheld ruling on Respondent's Petition For A Writ Of Mandamus And Prohibition until this Court reevaluated Williams' entitlement to an evidentiary hearing under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

limited to the factual record developed in state court proceedings, as the amended section 2254(e)(2) limits a petitioner's ability to present evidence in a federal habeas proceeding that was not considered by the state court.

Specifically, section 2254(e)(2), as amended, provides that a petitioner may not present evidence in a federal habeas proceeding that was not considered by the state court if the petitioner "failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). In addition, a petitioner is only entitled to an evidentiary hearing if:

> (A) the claim relies on –
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

While the Fourth Circuit has not yet addressed the applicability or meaning of section 2254(e)(2), Judge Ellis has carefully considered the proper interpretation of this section and concluded the following:

> [A]n applicant "fails" when he does not take or seek the opportunity to develop evidence in a state court proceeding. This is where (e)(2) applies. And this is where (e)(2)(A) may forgive the failure if new facts or a retroactive change in constitutional law form the basis of a claim. In contrast, an applicant does not "fail" where he seeks, but is denied, the opportunity to develop facts in state court. In this event, the rigorous standard of § 2254(e)(2) will not apply.

Cardwell v. Netherland, 971 F. Supp. 997, 1011 (E.D. Va. 1997). Thus, a petitioner's "failure" to develop the factual basis of a claim in state court proceedings must be attributable to some sort of fault on the part of the petitioner – i.e. something the petitioner did or omitted to do.

Other district and circuit courts have reached similar conclusions. *See, e.g., Jones v. Woods*, 114 F. 3d 1002, 1013 (9th Cir. 1997) ("Where, as here, the state courts simply fail to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims."); *Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997) ("To be attributable to a 'failure' under federal law the deficiency in the record must reflect something the petitioner did or omitted."); *Hunter v. Vasquez*, 1996 WL 612484, *6 (N.D. Cal. 1996) (holding that where the state court denies petitioner's requests for discovery, investigatory funds, and a hearing, "the Court cannot find that Petitioner failed adequately to develop the facts of his claims in state court.").

Moreover, the United States Supreme Court's recent decision in *Breard v. Greene*, 118 S. Ct. ___, 1998 U.S. LEXIS

2465 (April 14, 1988), does not compel a different conclusion. In *Breard*, the Supreme Court simply reiterated what the plain language of section 2254(e)(2) and the previously cited cases reveal – that the limitation on evidentiary hearings in federal habeas proceedings applies only when the *petitioner* fails to develop the factual basis of a claim in state court proceedings. *See id.* at *3. Contrary to Respondent's tortured interpretation of the relevant language, the Supreme Court did not hold that the word "fail" in section 2254(e)(2) be given a strict liability reading. As the Seventh Circuit has noted, if such was the case, "then a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts. Nothing in sec. 2254(e) or the rest of the AEDPA implies that states may manipulate things in this manner." *Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997).

Thus, the plain meaning of section 2254(e)(2) prohibits a federal evidentiary hearing only in those cases where a petitioner has been afforded an opportunity to develop evidence in state habeas court, but has failed to do so. *See* 28 U.S.C. § 2254(e)(2); *Cardwell v. Netherland*, 971 F. Supp. 997, 1011 (E.D. Va. 1997). Only under such circumstances is this Court precluded from considering new facts presented for the first time in federal habeas proceedings or granting an evidentiary hearing for the consideration of same.

In Petitioner's case, it is clear that he did not "fail[ ] to develop" the factual basis of his claims. The record is replete with examples of state habeas counsel's numerous attempts to obtain the evidence required to discover, present, and prove Williams' claims – including informal

attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied Williams the opportunity to develop the necessary facts by denying all of Williams' requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record. Under such circumstances, the Court is hard-pressed to find that Williams "failed to develop the factual basis of a claim in State Court proceedings," thereby triggering application of section 2254(e)(2).

Despite its concerns over the applicability of section 2254(e)(2) to cases such as the present one, however, this Court has been directed by its Court of Appeals to apply section 2254(e)(2) to Williams' case. Under that stringent standard, which is now the law of this case, the Court concludes that Williams is not entitled to an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5).

B. Analysis

As discussed above, unless Williams can satisfy both subsection (A) and subsection (B) of 28 U.S.C. § 2254(e)(2), this Court must deny him an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Based on the present record, the Court agrees with Respondent's argument that "regardless of whether petitioner can satisfy § 2254(e)(2)(A), he cannot possibly satisfy the stringent requirements of § 2254(e)(2)(B)." Resp't Resp. to CA4 Stay Order at 4.

Subsection (B) of 28 U.S.C. § 2254(e)(2) requires a showing by "clear and convincing evidence that but for [the alleged] constitutional error, no reasonable factfinder

would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). In the instant case, Williams was convicted of capital murder on evidence, including his own testimony, which demonstrated that he was a participant in the armed robbery of Mr. and Mrs. Keller, that he was at minimum an accomplice in the rape of Mrs. Keller, and that he fired the first shot into Mr. Keller's head. According to the medical evidence presented at trial, any of the three gunshot wounds to Mr. Keller's head could have been potentially lethal and all three definitely contributed to his death. *See* Tr. 1-4-94 at 252-56, 262-64. Based on this evidence alone, Williams cannot demonstrate by "clear and convincing evidence" that no reasonable juror would have found him guilty of the capital murder of Mr. Keller.

Moreover, there is no "but for" nexus between Claims I(A), IV(A)(1), or IV(A)(5) and the "innocence" requirement of subsection (B). As noted by Respondent, Claims I(A) and IV(A)(5) which involve a juror's allegedly untruthful answers during voir dire do not have any bearing on the evidence presented at trial of Williams' guilt in the shooting death of Mr. Keller. Furthermore, even assuming *arguendo* that some sort of informal understanding did exist between Williams' co-defendant, Cruse, and the Commonwealth prior to Cruse's testimony at Williams' trial [Claim IV(A)(1)], Williams' own testimony established that he shot Mr. Keller during the commission of a robbery and subsequent to the rape of Mrs. Keller and that therefore, he is guilty of capital murder. Thus, even if the jury chose to believe Williams' version of the shootings over Cruse's testimony, Williams himself admitted under oath to firing the

first shot into Mr. Keller's head – a shot which the medical examiner testified as being potentially lethal.

In light of the foregoing, the Court finds that Williams cannot make the requisite showing of "innocence" under 28 U.S.C. § 2254(e)(2) and thus, he is not entitled to an evidentiary hearing on his remaining claims. Accordingly, the Court will VACATE its Order granting an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5), and DISMISS Williams' federal habeas petition in its entirety.

An appropriate Order shall issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DATE: June 3, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS Plaintiff. v. J.D. NETHERLAND, WARDEN Defendant.	Civil Action Number 3:96CV529

ORDER

(Filed Nov. 12, 1998)

THIS MATTER comes before the Court on Petitioner Michael Wayne Williams' Motion to Alter or Amend this Court's June 3, 1998 Order, which dismissed his petition for federal habeas corpus relief under 28 U.S.C. § 2254, pursuant to Fed. R. Civ. P. 59(e).

This Court has made it clear previously that Rule 59(e) may not be used as a vehicle for revisiting issues that have already been argued and decided. *Delong v. Thompson*, 790 F. Supp. 594, 618 (E.D. Va. 1991). In this case, the issue at the heart of Petitioner's Motion – i.e., the precise import of the Fourth Circuit's May 28, 1998 Stay Order – was thoroughly argued by both sides. If the petitioner wishes to challenge this Court's resolution of that issue, the appropriate course of action is to appeal,

not to seek reconsideration under Rule 59(e). Accordingly, the instant Motion is DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

NOV 12 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS Plaintiff. v. J.D. NETHERLAND, WARDEN Respondent.	Civil Action Number 3:96CV529

ORDER

(Filed Dec. 15, 1998)

THIS MATTER comes before the Court on Petitioner Michael Wayne Williams' second Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e). This Court denied Williams' first Rule 59(e) motion on November 12, 1998. In doing so, the Court made clear that 59(e) is not the appropriate vehicle for challenging the dismissal of his habeas petition. The proper course is to appeal the dismissal to the United States Court of Appeals for the Fourth Circuit. Notwithstanding the Court's explicit direction, Williams has filed the instant motion. For the same reasons expressed in the Court's November 12, 1998 Order, the motion is hereby DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

December 15, 1998
DATE

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL WAYNE WILLIAMS, *Petitioner-Appellant,* v. JOHN B. TAYLOR, Warden, Sussex I State Prison, *Respondent-Appellee.*	)	No. 99-1

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge;
Robert R. Merhige, Jr., Senior District Judge.
(CA-96-529-3)

Argued: June 7, 1999

Decided: August 2, 1999

Before WILKINSON, Chief Judge, and
HAMILTON and WILLIAMS, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Hamiton and Judge Williams joined.

COUNSEL

ARGUED: Barbara Lynn Hartung, Richmond, Virginia, for Appellant. Donald Richard Curry, Senior Assistant

Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee. **ON BRIEF:** James E. Moore, CHRISTIAN & BARTON, L.L.P., Richmond, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

OPINION

WILKINSON, Chief Judge:

Michael Wayne Williams was sentenced to death for the murders of Morris Keller, Jr., and his wife, Mary Keller. At trial, Williams admitted to robbing the Kellers, being an accomplice to the rape of Mrs. Keller, and shooting Mr. Keller. He now appeals the district court's denial of his petition for a writ of habeas corpus. We affirm the judgment of the district court.

I.

Between 9:30 and 10:30 on the night of Saturday, February 27, 1993, Williams and Jeffrey Alan Cruse caught a ride with Verena Lozano James to a rural area in Cumberland County. Williams and Cruse intended to rob the nearby Bear Creek Market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.

After finding the market closed, Williams informed Cruse that "he knew a house where we can go; they'd have a couple thousand dollars." The two men then proceeded to the home of Mr. and Mrs. Keller. Mr. Keller opened the door, Williams pointed the .357 at him, and both Williams and Cruse walked inside the house.

Williams and Cruse then escorted Mr. Keller to the Kellers' kitchen, where the three men encountered Mrs. Keller. Williams demanded that the Kellers remove their clothing. Cruse then began to search the house for money and other valuables while Williams remained with the Kellers. Cruse located a fully-loaded .38 caliber handgun during his search. When Cruse returned to the kitchen, Williams suggested they tie the Kellers up, and Cruse did so with some phone cord. Williams and Cruse then placed the Kellers in a living room closet and continued their search of the house.

Some time later Cruse moved Mrs. Keller, still naked, to another closet – this one in a back bedroom of the house. Both Williams and Cruse then raped Mrs. Keller. During the rape Mrs. Keller pleaded, "Just don't hurt us." After they had finished, Williams and Cruse retrieved Mr. Keller, and Williams instructed both Kellers to take showers and put on clean clothing. Williams then told the Kellers they were going to "take a walk." On the way out of the house Williams informed Mrs. Keller that he planned to burn the house. Upon Mrs. Keller's request, Williams accompanied her back inside to get the Kellers' marriage license.

With Williams carrying the .38 and Cruse the .357, the two men walked the Kellers down a dirt road and into a thicket. Williams then took up a position directly behind Mr. Keller and Cruse stood behind Mrs. Keller. Williams said, "We'll shoot at the count of three." At the count of three, Williams shot Mr. Keller, who fell to the ground. Cruse did not fire. Williams turned to Cruse and told him to shoot. After Cruse shot and Mrs. Keller fell, Mr. Keller stood up again. Williams then shot him a

second time. As Cruse began to walk away, Williams said, "Wait. . . . What if they ain't dead?" Williams then approached the Kellers and shot each a few more times.

Williams and Cruse next returned to the house, where they loaded the Kellers' Jeep Cherokee with their television set, microwave oven, stereo and speakers, and shotgun. After loading the Cherokee, the two men set fire to the house.

The next day Williams and Cruse sold some of the property they had taken from the Kellers. They then threw the remaining property and the .357 into the Rappahannock River and set fire to the Cherokee.

When James heard about the fire at the Kellers' house, she contacted the police and informed them that she had deposited Williams and Cruse near the house on the night of the fire. The police interviewed Cruse, who was unresponsive until the police located the bodies of Mr. and Mrs. Keller.

After consulting counsel, Cruse agreed to a plea bargain pursuant to which he would disclose his knowledge of the crimes in exchange for a promise from the Commonwealth not to seek the death penalty. Cruse then gave a statement in which he explained the events of the fateful night in detail, with the exception of Cruse's own participation in the rape of Mrs. Keller. Upon learning of Cruse's falsehood, the Commonwealth revoked its plea agreement with Cruse and later indicted him for capital murder.

Williams was indicted for the capital murder, robbery, rape, and abduction of Mrs. Keller; for the capital

murder, robbery, and abduction of Mr. Keller; for capital murder based on two related homicides; statutory burglary; and arson. At trial in January 1994, Williams took the stand in his own defense. He confirmed significant parts of the Commonwealth's case. In particular, he indicated that he was the one who suggested robbing the Bear Creek Market, that it was his suggestion to set fire to the Kellers' house, and that he shot Mr. Keller in the head. He contradicted portions of the evidence presented against him, most of which was in the form of testimony by Cruse. Specifically, he denied that he also raped Mrs. Keller, that he fired any shots other than the first one, and that he was the instigator at various other points during the commission of the crimes.

The jury convicted Williams of capital murder. It then recommended the death sentence on the basis of Williams' future dangerousness and the vileness of his crimes. The trial court agreed with the jury's recommendation and sentenced Williams to death. The Supreme Court of Virginia affirmed the conviction and sentence, *Williams v. Commonwealth*, 450 S.E.2d 365 (Va. 1994), and the United States Supreme Court denied certiorari, *Williams v. Virginia*, 515 U.S. 1161 (1995).

Williams then filed a petition for state habeas and moved for discovery, an evidentiary hearing, and expert assistance. The Supreme Court of Virginia denied these motions and the petition, stating without explanation that Williams' claims were meritless. The United States Supreme Court again denied certiorari. *Williams v. Netherland*, 519 U.S. 877 (1996).

Next, Williams filed a petition for habeas corpus in the United States District Court for the Eastern District of Virginia. The district court granted Williams an evidentiary hearing on three of his claims and dismissed the rest. Because Williams filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, this court entered a stay and instructed the district court to reconsider its grant of an evidentiary hearing in light of 28 U.S.C. § 2254(e) as amended by that Act. After applying the AEDPA, the district court denied Williams' request for an evidentiary hearing and dismissed his petition in its entirety. Williams now appeals.

II.

Williams maintains he was entitled to an evidentiary hearing in the district court to establish several claims. Two of those claims arise under the Sixth Amendment. First, Williams claims that one of the jurors failed to answer honestly questions put to her on voir dire. *See United States v. Bynum*, 634 F.2d 768 (4th Cir. 1980). Specifically, Williams contends that juror Bonnie Stinnett failed to disclose that she had once been married to Deputy Sheriff Claude Meinhard – who would testify for the Commonwealth – when Stinnett was asked whether she was related to any witness in the case. Williams also maintains that Stinnett withheld the fact that prosecutor Robert Woodson had represented her in her divorce proceedings. Second, Williams claims that the prosecutor improperly failed to correct the dishonest juror. Williams argues that Woodson failed to disclose both of these pieces of information and thereby violated his right to a

fair trial. *See United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993).

With respect to his other claim, Williams maintains that the Commonwealth failed to provide him with exculpatory evidence as required under *Brady v. Maryland*, 373 U.S. 83 (1963). In particular, Williams claims that the Commonwealth failed to disclose a psychiatric evaluation that indicated Cruse had little specific recollection of the events surrounding the Keller murders.

A.

The district court denied Williams an evidentiary hearing on these claims. Section 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). The district court held that whatever else Williams could show, he could not demonstrate actual innocence as required by section 2254(e)(2)(B).

Williams argues that the district court erred in applying section 2254(e)(2) to his request at all. He maintains that section 2254(e)(2) applies only when the petitioner "has *failed* to develop the factual basis of a claim in State court." *Id.* (emphasis added); *see also Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir.), *cert. denied*, 119 S.Ct. 587 (1998). According to Williams, he did not "fail" to develop the factual foundation for any of these claims in state court. Williams argues that he had no way of knowing the specific facts underlying his claims. This is especially true, Williams maintains, because the Supreme Court of Virginia denied his requests for discovery, a hearing, and expert and investigative assistance. Williams contends, therefore, that section 2254(e)(2) should not apply to his request for a hearing in district court.

We disagree. To escape the requirements of section 2254(e)(2), a petitioner must "diligently . . . develop the factual basis of" his claim in state court. *Cardwell*, 152 F.3d at 337; *see also Wright v. Angelone*, 151 F.3d 151, 164 (4th Cir. 1998) (in order to obtain evidentiary hearing petitioner must show "why the factual predicate for this claim could not have been discovered earlier"). Ignorance in and of itself is not sufficient to show diligence; that ignorance must be reasonable. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (to be excused, legal basis of a

claim must not be reasonably available). Nor may a petitioner's requests for investigative assistance, hearings, and discovery on state habeas be vague and conclusory. Rather, a petitioner must tie his requests to his specific claims and state with some particularity the need for assistance. To hold otherwise would permit criminal defendants to avoid the strictures of section 2254(e)(2) simply by churning out unsupported, boiler plate requests for state court discovery, hearings, and investigative and expert assistance.

Williams clearly has not "diligently sought to develop the factual basis of" his claims for federal habeas relief. *Cardwell*, 152 F.3d at 337. The documents supporting Williams' Sixth Amendment claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well. Williams' request for investigative assistance was also deficient. He alluded vaguely to "irregularities, improprieties and omissions" with regard to jury selection and asked for an investigator to examine "all circumstances relating to the empanelment of the jury and the jury's consideration of the case." This request in no way alerted the state habeas court to any specific claim. *See Picard v. Connor*, 404 U.S. 270, 275 (1971) ("[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." (internal quotation marks omitted)). The failure to develop the Sixth Amendment claims was thus

attributable to petitioner, not to the Supreme Court of Virginia's rejection of a fishing expedition request.

The same is true of Cruse's psychiatric evaluation. In support of his claim that the Commonwealth suppressed the evaluation, Williams provides nothing more than an affidavit from his state habeas counsel attesting to "no recollection of seeing this report in Mr. Cruse's court file." In light of the fact that Williams' federal habeas counsel located the evaluation in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence. Indeed, that failure tends to show that counsel did *not* act diligently.

Thus, it is clear that section 2254(e)(2) applies to Williams' request for a hearing. It is equally clear that Williams is ineligible for a hearing in federal court under this section. To be eligible, Williams must be able to demonstrate both due diligence and that "but for [the alleged] constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(A)(ii)-(B).

The discussion above makes plain that Williams was not duly diligent. Nor can Williams show that no reasonable factfinder would have found him guilty of capital murder. At trial Williams himself testified that he robbed the Kellers at gunpoint, was at least an accomplice to the rape of Mrs. Keller, and was the first person to shoot Mr. Keller in the head. The Commonwealth's Assistant Chief Medical Examiner, who performed the autopsy on Mr. Keller, testified that each gunshot wound suffered by Mr. Keller contributed to his death. Moreover, although Williams denied that he raped Mrs. Keller, tests on seminal

fluid retrieved from her body revealed that some of the fluid could be attributed only to Williams.

Under Virginia law, this evidence was more than sufficient to convict him of capital murder. *See Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991) ("We adhere to the view that where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes."); *Briley v. Commonwealth*, 273 S.E.2d 57, 63 (Va. 1980) (holding that it is only necessary to prove that defendant was immediate perpetrator in the murder and accomplice in the rape to convict of capital murder). In sum, it is not surprising that the district court found that based "on this evidence alone, Williams cannot demonstrate by 'clear and convincing evidence' that no reasonable juror would have found him guilty of the capital murder of Mr. Keller," that "Williams cannot make the requisite showing of 'innocence' under 28 U.S.C. § 2254(e)(2)," and that "he is not entitled to an evidentiary hearing on his remaining claims."

B.

Even were section 2254 not to apply, Williams would be unable to show his eligibility for a hearing under pre-AEDPA law. *See Cardwell*, 152 F.3d at 337 ("If, on the other hand, the applicant has not 'failed to develop' the facts in state court, the district court may proceed to consider whether a hearing is appropriate, or required under [pre-AEDPA law]."). Williams can show neither cause for nor prejudice from his failure to raise the aforementioned

Sixth Amendment and *Brady* claims in state court. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

To demonstrate cause, Williams must establish that " 'some objective factor external to the defense impeded counsel's efforts.' " *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). As noted, Williams' failure to develop the facts in state court was due to his own lack of diligence. Williams neither brought forth reasonably available facts, nor made reasonable efforts to convince the Supreme Court of Virginia that additional discovery was warranted.

Williams is also unable to demonstrate prejudice. In order to do so, he must show that, absent the alleged constitutional violation, the outcome of the case likely would have been different. *See Carrier*, 477 U.S. at 494. As we have indicated, Williams' trial testimony alone was enough to convict him. *See Fitzgerald v. Greene*, 150 F.3d 357, 366 (4th Cir.) (finding no actual prejudice based on overwhelming evidence of guilt, future dangerousness, and vileness of crime), *cert. denied*, 119 S.Ct. 389 (1998). Moreover, Williams' claims with respect to juror Stinnett were marginal. It is hardly clear that Stinnett was related to Deputy Sheriff Meinhard given that the two divorced some fifteen years before Williams' trial. Furthermore, Meinhard's testimony was brief and did not speak to the critical facts of the trial. In fact, Williams' trial attorneys saw no need to cross-examine him. And the prosecutor explained his failure to notify the court of the relationship in an affidavit in which he stated that he simply did not remember being involved in Stinnett's divorce – a plausible claim given that the divorce occurred fifteen years prior to Williams' trial and was uncontested.

Finally, it is anything but clear that a divorce from one of the Commonwealth's witnesses would predispose a juror toward the Commonwealth's case.

For all of these reasons, the district court properly denied Williams' request for an evidentiary hearing.

III.

Williams next challenges the district court's dismissal of two claims on which the Supreme Court of Virginia found against Williams on the merits. We review decisions by state courts on the merits of a claim under section 2254(d). Section 2254(d) provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under normal circumstances, section 2254(d)(1) prohibits the issuance of the writ unless the state court decision conflicts squarely with Supreme Court precedent which is controlling as to law and fact,

or if no such precedent exists, if "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant supreme court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 844 (1999). Where, as here, "the state court decision fails to articulate any rationale for its adverse determination . . . [we] must independently ascertain whether the record reveals a violation of [petitioner's constitutional rights.]" *Cardwell*, 152 F.3d at 339. Nonetheless an overall obligation of deference to the state court system still obtains, and a state court's perfunctory decision both constitutes an adjudication on the merits, *see Wright v. Angelone*, 151 F.3d 151, 156-57 (4th Cir. 1998), and must be upheld if it "is at least minimally consistent with the facts and circumstances of the case." *Weeks v. Angelone*, 176 F.3d 249, 259 (4th Cir. 1999) (internal quotation marks omitted). Here that standard of minimal consistency was more than met.

A.

Williams first claims that the prosecution suppressed an alleged informal plea agreement that the Commonwealth had with Cruse in violation of *Brady*. The Supreme Court of Virginia was correct, however, to reject Williams' claim. In state court the Commonwealth supplied two affidavits – one from Woodson and one from Cruse's trial counsel, Donald Blessing – stating unequivocally that Cruse had no agreement. Specifically, Woodson swore, "At the time Cruse testified against Williams in January

of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty." Similarly, Blessing stated, "Cruse testified truthfully at . . . trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence."

Moreover, before the district court, the Commonwealth introduced another affidavit from Blessing, in which he swore, "At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth." The district court thus properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's determination in a federal hearing in view of the unrefuted evidence. *See Eaton v. Angelone*, 139 F.3d 990, 995 (4th Cir.) (refusing to transform "a federal habeas proceeding into a second trial."), *cert. denied*, 118 S.Ct. 2338 (1998); *Spencer v. Murray*, 18 F.3d 229 (4th Cir. 1994) (upholding denial of habeas corpus on basis of trial counsel's affidavit); *Sawyers v. Collins*, 986 F.2d 1493, 1504 (5th Cir. 1993) (en banc) (upholding denial of habeas corpus without evidentiary hearing even when state court made factual determination solely on basis of affidavits).

Finally, even if Williams could demonstrate that Cruse had an informal plea agreement, he could not show materiality. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (demonstration of a *Brady* claim requires a showing of materiality). Given Williams' own testimony that he was at least an accomplice in the rape of Mrs. Keller and that he

shot Mr. Keller in the head, we are confident there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 433-34 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). As a result, we agree that Williams failed to demonstrate a *Brady* violation.

B.

Williams next argues that the prosecutor violated his Sixth Amendment right to be present at trial and to confront adverse witnesses. *See Illinois v. Allen*, 397 U.S. 337 (1970) (Sixth Amendment right to be present at trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confront prosecution's witnesses). Specifically, Williams charges that prosecutor Woodson impermissibly burdened those rights when, on cross-examination, he asked Williams, "You're the only witness who has sat in here through this trial and heard the testimony of every witness before you got to testify; isn't that correct?"[1]

We need not decide whether allowing the prosecutor to proceed with this line of questioning was constitutional error because even if it were, the error was harmless. *See Sherman v. Smith*, 89 F.3d 1134, 1137 (4th Cir. 1996) (en banc) (noting that harmless error analysis applies to similar trial errors such as improper comment

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[1] Indeed, the Supreme Court has recently granted certiorari on this very question. *Portuondo v. Agard*, 119 S.Ct. 1248 (1999).

on defendant's silence at trial). Woodson's line of questioning was clearly aimed at impeaching Williams' testimony in the eyes of the jury. Such impeachment, however, would only have undermined Williams' exculpatory testimony, leaving unaffected his inculpatory testimony. And, as noted, Williams' inculpatory testimony was devastating. In such circumstances, it is clear that the error, if that it was, did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted).

Williams' claim is similarly unavailing under pre-AEDPA law. Whether or not we would determine independently that Woodson's question violated Williams' Sixth Amendment rights, it is clear that such a holding would create a new rule. *See Teague v. Lane*, 489 U.S. 288 (1989). Williams points to *Griffin v. California*, 380 U.S. 609 (1965), and *Brooks v. Tennessee*, 406 U.S. 605 (1972), to support his claim. In *Griffin*, the Supreme Court established that drawing a negative inference from the fact that a defendant has exercised his right to remain silent violates his Fifth Amendment rights. 380 U.S. at 613. In *Brooks*, the Court held that requiring a defendant to testify first or not to testify at all also impermissibly burdened his Fifth Amendment right to remain silent. 406 U.S. at 613. Neither decision held that it is constitutionally impermissible to impeach the defendant's testimony if he decides not to remain silent by commenting on his singular ability to hear the entirety of the preceding witnesses' testimony. Indeed, the Court in *Brooks* was careful to recognize the "risk of a defendant's coloring his testimony to conform to what has gone before" and to

stress that "our adversary system reposes judgment of the credibility of all witnesses in the jury." *Id.* at 611. In short, we cannot hold that either *Griffin* or *Brooks* "dictate[s]" a finding of constitutional error in circumstances such as these. *Stringer v. Black*, 503 U.S. 222, 228 (1992).

The district court correctly denied Williams' requests for relief on these two claims.

IV.

A.

Williams next argues that the district court misinterpreted 21 U.S.C. § 848(q)(9). Section 848(q)(9) governs the granting of expert assistance to indigent prisoners in connection with their federal habeas proceedings, providing that

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). *No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.* Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

Id. (emphasis added).

Williams contends that the district court erred in interpreting this section to require Williams to show a need for confidentiality in an adversary hearing. When the district court made that determination, Williams refused to participate in an adversary hearing, and the district court denied his request for expert assistance.

We agree with the district court. In limiting *ex parte* requests for expert assistance, Congress was clearly addressing the routine approval of such requests even in those instances where expert or investigative services were unnecessary. Section 848(q)(9) explicitly provides that there shall be no "*ex parte* . . . communication . . . pursuant to this section" without a showing of a need for confidentiality. *Id.* Allowing an *ex parte* hearing to determine the need for an *ex parte* hearing not only seems convoluted, but it also runs afoul of the plain language of the statute. *See United States v. Gonzales*, 150 F.3d 1246, 1264 (10th Cir. 1998) (process is one that "is *not* to be held *ex parte unless* a proper showing is made concerning the need for confidentiality." (emphasis added) (internal quotation marks omitted)), *cert. denied sub nom. Albuquerque Journal v. Gonzales*, 119 S.Ct. 918 (1999); *Patrick v. Johnson*, 37 F.Supp.2d 815, 816 (N.D.Tex. 1999) ("Section 848(q)(9) clearly requires 'a proper showing . . . concerning the need for confidentiality' before the Court may consider *any ex parte* communication or request." (emphasis added) (quoting 21 U.S.C. § 848(q)(9))).

The district court also rightly denied Williams' request for expert assistance. When Williams refused to proceed after the district court required him to demonstrate his need for confidentiality in an adversary hearing, he necessarily failed to show that expert services were "reasonably necessary." 21 U.S.C. § 848(q)(9).[2]

B.

Finally, Williams argues that the district court erred by requiring him to file his federal habeas petition within 180 days of April 24, 1996 – the AEDPA's enactment date – pursuant to 21 U.S.C. § 2263. Williams contends that section 2263 applies only to "opt-in" states – those states that have met certain requirements pertaining to, *inter alia*, the appointment and compensation of counsel for post-conviction relief proceedings. Because this circuit has not yet recognized Virginia as an "opt-in" state, Williams contends that applying section 2263 was error. Instead, Williams maintains, the district court should have granted him one year from the effective date of the AEDPA to develop his petition further. *See Brown v.*

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[2] We are unpersuaded by Williams' argument that our interpretation of section 848(q)(9) renders it unconstitutional. Williams' sole contention is that any reading of section 848(q)(9) that requires a petitioner to divulge confidential information impermissibly impinges on his right of access to the courts. *See Gardner v. California*, 393 U.S. 367 (1969) (requiring that hearing transcripts that are made available to all be provided to indigent habeas petitioners to guarantee access to the courts). We do no more here than uphold the district court's determination that petitioner must demonstrate his need for confidentiality at a hearing. What information is disclosed at that hearing would of course remain within the discretion of the district court.

Angelone, 150 F.3d 370, 375 (4th Cir. 1998) (granting petitioners whose convictions became final in a non-opt-in state before the effective date of the AEDPA one year from the effective date to file their petitions).

Any error here was harmless. Williams' case remained in district court for a year and a half after he filed his petition. Yet Williams made not one motion to amend on the basis of claims developed during the petition's pendency. Furthermore, although Williams requests a remand for an additional five months in which to amend his petition now, he provides no additional claims he might like to add. In all events, Williams cannot demonstrate that the district court's error prejudiced him.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

(ORDER LIST: 528 U.S.)

THURSDAY, OCTOBER 28, 1999

CERTIORARI GRANTED

99-6615 WILLIAMS, MICHAEL WAYNE V. TAYLOR, (99a307) WARDEN

The application for stay of execution of sentence of death presented to the Chief Justice and by him referred to the Court is granted. The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 2 presented by the petition.

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(10)

Dec 23 1999

No. 99-6615

Supreme Court, U.S.
FILED
DEC 23 1999
CLERK

In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison, Waverly, Virginia,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

*BARBARA L. HARTUNG
1001 E. Main St.,
Suite 504
Richmond, VA 23219
(804) 649-1088

JOHN H. BLUME
KEIR M. WEYBLE
1247 Sumter St.,
Suite 202
Columbia, SC 29201
(803) 765-1044

JAMES E. MOORE
CHRISTIAN & BARTON, L.L.P.
909 E. Main St., Suite 1200
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

63pp

CAPITAL CASE

QUESTION PRESENTED

Whether 28 U.S.C. § 2254(e)(2), which prohibits a federal habeas court from holding an evidentiary hearing only "if the applicant has failed to develop the factual basis of a claim in State Court proceedings," governs petitioner's claims where throughout the state proceedings, the state suppressed the relevant facts, denied petitioner's discovery requests, denied all investigative and expert resources to investigate, develop, and discover claims, and denied an evidentiary hearing?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of Williams' petition for habeas corpus relief is reported as *Williams v. Taylor*, 189 F.3d 421 (4th Cir. 1999), and is found in the joint appendix at 651-671. The district court's opinion dismissing the petition is reported at 6 F. Supp. 2d 545 (E.D. Va. 1998), and is in the joint appendix at 638-646. The order of the court of appeals granting an emergency stay of the evidentiary hearing is unreported and is in the joint appendix at 635-637. The previous order of the district court granting Williams an evidentiary hearing is unreported and is in the joint appendix at 529-613. The Virginia Supreme Court's order dismissing Williams' state habeas petition is in the joint appendix at 444-445. The Virginia Supreme Court's opinion on direct review is reported as *Williams v. Commonwealth*, 450 S.E.2d 365 (Va. 1994), *cert. denied*, 515 U.S. 1161 (1995).

JURISDICTION

The court of appeals' judgment was entered August 2, 1999. Rehearing and a suggestion for rehearing *en banc* were denied August 27, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a * * * trial by an impartial jury * * * [and] to be confronted with the witnesses against him * * * .

The case also involves the Fourteenth Amendment:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

The case further involves 28 U.S.C. § 2254(e)(2), which states:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

The Crime and the Issues for Trial

On February 27, 1993, Verena James drove petitioner Williams and Jeffrey Alan Cruse to a rural area of Cumberland County, Virginia. Both men were drunk; they intended to rob a store. Finding the store closed, they robbed the nearby house of Morris and Mary Keller. Mr. and Mrs. Keller were each shot several times and left for dead in a wooded area behind their home. Mrs. Keller was sexually assaulted. Several items were taken from the Keller house, which was set on fire. The Kellers' automobile was stolen. *Williams v. Commonwealth*, 450 S.E.2d 365, 369-70 (Va. 1994).

No one disputed these facts at Williams' trial. What was hotly contested was who – Cruse or Williams – had led the whole venture, raped Mrs. Keller, and fired the shots that killed Mr. and Mrs. Keller.[1] Each man insisted that he had fired only a single shot during the episode and that the remaining shots were fired by the other. This dispute was crucial because, under Virginia's definition of capital murder, only an individual who "actually fired the fatal shot" or shots is guilty of that crime and subject to a death sentence. *See* Va. Code § 18.2-31; *Cheng v. Commonwealth*, 393 S.E.2d 599, 607-08 (Va. 1996); *Johnson v. Commonwealth*, 255 S.E.2d 525, 530 (Va. 1979). Even in cases where two or more confederates shoot the victim or victims, as the testimony in this case established, a jury cannot find capital murder unless it determines beyond a reasonable doubt that the defendant took a "direct part in inflicting fatal injuries." *Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991). Otherwise, the defendant can be convicted only of the lesser offense of first degree murder, which is not punishable by death. *Frye v. Commonwealth*, 345 S.E.2d 267, 280 (Va. 1986). As we discuss in detail below, the jury in Williams' case had, for all practical purposes, one and only one issue to decide: Was Michael Williams guilty of capital murder or of first degree murder?

The Investigation and Trial

On February 28, 1993, Verena James heard about the fire at the Kellers' house. She called local deputy sheriff Claude Meinhard and told him that "she had taken Williams and Cruse to an area not far from the house on the night of the fire." 450 S.E.2d at 370. Meinhard and another officer immediately went to question Cruse. JA 68. Cruse initially "furnished no information of value to the police, . . . [but] after the police discovered the bodies of the Kellers . . . Cruse consulted counsel." *Id.* at 370. Cruse's attorney negotiated an

[1] Williams was charged with five counts of capital murder and related offenses, and Cruse was charged with two counts of capital murder and related offenses.

agreement under which the Commonwealth would spare Cruse's life if Cruse gave a statement and testified against Michael Williams. "Cruse then furnished information that implicated both men in all the crimes charged, except for Cruse's role in Mrs. Keller's rape." *Id.* Cruse gave this statement on March 2, 1993. Subsequently, when forensic reports and other information obtained by the Commonwealth revealed that Cruse had failed "to tell the police that he had raped Mrs. Keller," the Commonwealth maintained that Cruse had breached the negotiated agreement. *Id.*

Prior to trial, Williams' counsel filed a *Brady v. Maryland*, 373 U.S. 83 (1963) motion specifically requesting, among other things, (1) information regarding any "confessions or statements" by Cruse, (2) "[a]ny and all consideration or promises of consideration given to" Cruse, whether "formal or informal," "direct or indirect," and (3) any "psychiatric, psychological and mental health records" relating to Cruse. JA 24-28. The trial court ordered the Commonwealth to produce any exculpatory information. JA 30.[2]

Williams' trial began on January 3, 1994. The medical examiner, Dr. Deborah Kay, testified that Mrs. Keller was shot three times in the face. JA 165. Dr. Kay was not able to determine the order of the shots, *id.*, but, in her opinion, all three of Mrs. Keller's wounds could have been lethal "in and of themselves, each individually." JA 184. Mr. Keller was shot five times. JA 174. Three shots were to the head, two of which passed through Mr. Keller's brain. JA 174-179.[3] In Dr. Kay's opinion, two of the wounds were "more serious in the

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[2] In response to this order, the Commonwealth produced the following items: the investigative file including the summary of the investigation prepared by the state police; Cruse's criminal record; Cruse's statements to the police; Cruse's testimony at the preliminary hearing; and information regarding (but not a copy of) the revoked plea agreement with Cruse. JA 431. The materials that are the subject of Williams' present *Brady* claims were not included.

[3] Mr. Keller was also shot twice in the legs. JA 179-180.

sense that . . . they passed through the brain, so that those two are definitely potentially lethal," JA 186, but, as to the third wound, she "[could] not tell" if it was a fatal injury. JA 185.[4] Dr. Kay testified that if the wound which bypassed Mr. Keller's brain was the first shot, it would have been possible for him to move after receiving it. JA 179.

Cruse testified for the Commonwealth. He maintained that the idea to commit a robbery was Williams' and that Williams selected the Keller home. Cruse and Williams forced their way into the house after asking to use the phone. They were armed with a .357 Ruger Blackhawk pistol. Once inside, Cruse said, Williams dictated all their actions. JA 76-78, 85, 91, 96. Cruse searched the house and found a loaded .38 revolver and .38 bullets. JA 82-83.[5] Cruse and Williams had sex with Mrs. Keller. JA 93-94. After ransacking the house, they took the Kellers outside, "[d]own a dirt road and into a thicket." JA 99.

Cruse described what followed this way: Cruse was unaware of any plan to kill the Kellers until moments before the first shots were fired. JA 102. Williams said "we'll shoot at the count of three." JA 103. Williams shot Mr. Keller. Cruse didn't fire until Williams said "he didn't want to leave no witnesses." JA 103. Cruse shot Mrs. Keller and she "fell down." JA 104. Mr. Keller then stood back up and Williams shot him again. JA 104. As Williams and Cruse walked off, Williams said "what if they ain't dead?" and shot the Kellers "a couple more times apiece." JA 106.

Although Cruse stood indicted for two counts of capital murder and was guilty of capital murder by his own testimony (since he fired one of the three lethal shots at Mrs. Keller), Cruse asserted that there was no deal of any kind between him

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[4] Dr. Kay testified that the third gunshot wound to the head contributed to Mr. Keller's death just as "any gunshot wound, even if it might not be lethal, . . . is contributory." JA 181.

[5] Cruse testified that he and Williams switched possession of the guns several times during the course of the evening. *See, e.g.*, JA 94; 108.

and the prosecution. On direct examination, cross, and redirect, Cruse maintained that he had no agreement with the Commonwealth about his sentence and that he was receiving nothing in exchange for his testimony. JA 135; 159.

Williams testified in his own defense, directly contradicting Cruse's account of the robbery, sexual assault and homicides. He said that Cruse had actively participated in the decision to commit the robbery and was not simply Williams' meek follower. Cruse, not Williams, had raped Mrs. Keller.[6] Cruse, not Williams, had said they should murder the Kellers to eliminate them as witnesses. JA 231-232. Williams admitted his part in the robbery and arson but testified that he had fired only one shot that night. He fired the first shot at Mr. Keller, using the .38 caliber pistol; Mr. Keller got up after that shot; then Cruse walked forward and shot Mr. Keller several times. JA 226-233; 245.

Williams' defense to the capital murder indictment was straightforward: Cruse was lying; Williams fired only one shot; that shot was not fatal. Williams was therefore guilty of first degree murder but not of capital murder. Relying on the medical examiner's testimony that one of the bullet wounds to Mr. Keller's head went through the facial bones and was not likely fatal in and of itself, Williams maintained that this was the shot he fired because Mr. Keller got up after Williams shot him. JA 233. The fatal shots to both victims thus came from Cruse. As defense counsel stated in summation: "our theory is . . . that Mr. Cruse fired all three shots that killed Mrs. Keller. . . . And . . . based upon the evidence that you

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[6] The forensic tests were inconclusive. Dr. George Li, a forensic expert called by the Commonwealth, testified that "if this came from only one sperm source . . . then this type could only have come from Mr. Cruse and not Mr. Williams." JA 205; 207-208. If there was more than one donor of semen, then Li's test results were consistent with both Williams and Cruse. JA 206. Lisa Schiermeier, another forensic expert called by the Commonwealth, testified that a specific antigen "2-" could only have come from Williams. In Schiermeier's view, if there were more than one donor, Cruse could not be eliminated. JA 195.

see, when Mr. Keller stood up, that the wound that [the medical examiner] . . . said was possibly non-lethal . . . was the one that . . . Mr. Williams fired from the .38. . . . " JA 280. "And I submit to you that Mr. Cruse is lying. . . . Now I'm not suggesting to you that Mr. Williams is not guilty, that because of my scenario he walks, he gets off of murder. He's guilty of first degree murder on both counts." JA 280.

The Commonwealth's Attorney acknowledged that "the only dispute is about the rape and whether he is guilty of first degree murder or capital murder." JA 282. Thus, the prosecution's strategy was equally clear: bolster Cruse's testimony; undermine Williams' credibility. Accordingly, the Commonwealth vouched for Cruse's credibility because "[t]here is no agreement with Mr. Cruse. What he is doing is on his own. When this is over he goes to trial and faces the death penalty on two charges of capital murder." JA 265.[7] The other half of the Commonwealth's strategy was to stress that Williams had been present during the testimony of the other witnesses and so should not be believed. JA 237-239. This tactic started when the Commonwealth cross-examined Williams; it returned to this theme in summation:

> Williams sat right here – and he's got a right to do it – and he listened to everybody. Mr. Cruse didn't have that right to sit here and listen to everybody.

JA 272.

The trial court charged the jury on both capital murder and first degree murder. After deliberating for about four hours, the jurors convicted Williams on all counts, including capital murder.[8] JA 295-299.

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[7] During its rebuttal argument, the Commonwealth again argued that Cruse's version of the crimes should be credited: "And like he told you right now, his back is against the wall; if he lies, he dies, and that is his situation." JA 284.

[8] At the sentencing phase, the Commonwealth presented – over trial counsel's objection – evidence that Williams was charged with four murders in a nearby county. Williams presented evidence that he had "no

A trial date was never set for Cruse. On March 14, 1994, several weeks after Williams was sentenced to death, Cruse pled guilty to the capital murder of Mrs. Keller and to the reduced charge of first degree murder of Mr. Keller. JA 401-414. At Cruse's sentencing hearing, the prosecutor urged the Court to spare Cruse's life because he had testified for the Commonwealth at Williams' trial. JA 418; 420. Cruse received a life sentence on April 26, 1994, JA 427, and is now incarcerated at an unknown location outside Virginia.

State habeas corpus proceedings

After Williams' convictions and death sentences were affirmed on direct appeal, *Williams v. Commonwealth*, 450 S.E.2d 365 (Va. 1994), he pursued state collateral remedies. Eric D. White was appointed to represent Williams in connection with the state habeas proceeding. White immediately set about to conduct an appropriate investigation, gather records, and interview witnesses in order to identify and present all available collateral claims for relief.

White sent a letter to Sheriff Meinhard on October 23, 1995, saying: "I would like to meet with members of your department who were involved in the investigation and who testified at [Williams'] . . . trial. I would also like to review the investigative files of those employees." JA 340. Sheriff Meinhard and his employees never responded to White's request and never provided him with the requested files.

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prior convictions for violent crimes." 450 S.E.2d at 379. Evidence was also presented that Williams "suffered from . . . Attention Deficit Hyperactivity Disorder, which adversely affected him in school and limited his ability to function in society as he matured." *Id.* at 378. "[T]he effects of his disorder were exacerbated by his unstable home life and a sexual assault by an older man when Williams was 14 years old." *Id.* There was extensive testimony that Williams "was a caring, loving, generous and dependable person." *Id.* The jury found both the vileness and future-dangerousness aggravating circumstances and sentenced Williams to death. JA 333-334. On February 22, 1994, the trial judge imposed the death sentences. JA 337-338.

White also wrote to Warren Von Schuch, the lead trial prosecutor, and Donald Curry, the Senior Assistant Attorney General managing the litigation for the Commonwealth in the state habeas proceedings. White requested permission to review "all materials and evidence in the possession, custody or control of the Commonwealth or its agents" and specifically requested, *inter alia*:

> ◆ "All reports of physical or mental examinations . . . conducted in connection with the investigation of the offense, including but not limited to . . . all psychological tests . . . performed upon any prosecution witness";
>
> ◆ "Any and all such considerations or promises of consideration given during the course of the investigation and trial of this case by any law enforcement officials, including prosecutors or agents, police or informers, to or on behalf of any witness the prosecutor called at trial, or any such consideration or promises expected or hoped from any such witness at any future time. . . . ";
>
> ◆ "A copy of all medical or psychiatric reports known to the prosecutor concerning any witness the prosecutor called at trial which arguable [sic] affected the witness' credibility, ability to perceive or ability to recall events."

JA 344-351.

Curry replied in a November 1, 1995, letter saying: "we have no intention . . . of [inspecting and reviewing the files] for the purpose of identifying, material, exculpatory evidence." JA 352. Curry stated two reasons for refusing to determine if the Commonwealth possessed such evidence. First, he recounted that Williams' trial counsel had "filed a lengthy request for exculpatory evidence prior to trial and the Commonwealth responded at that time." Second, "I know of no authority that requires the Commonwealth, as the respondent in a civil habeas proceeding, to comply with such a request from petitioner's counsel." *Id.*

On November 30, 1995, White filed a motion for expert services in the Virginia Supreme Court.[9] He specifically requested "an investigator to examine issues relating to the testimony and status of the co-defendant, Jeffrey Cruse, and issues relating to the jury's consideration of this case." JA 355. White told the court that he had been unable to locate Cruse to conduct an independent investigation into the accuracy of his testimony or the existence of any "plea negotiations, arrangements, discussions, meetings, etc. between the Commonwealth and petitioner's co-defendant, Jeffrey Cruse." JA 358. White also told the court that he needed the services of an investigator "to examine all circumstances relating to the empanelment of the jury and the jury's consideration of the case . . . [to determine the existence of] irregularities, improprieties and omissions . . . with regard to the empanelment of the jury." *Id.*

The Commonwealth, again through Senior Assistant Attorney General Curry, opposed the motion for expert services, labeling the request for an investigator "frivolous." JA 367. After noting that the trial court had denied trial counsel's motion for an investigator, Curry maintained that the "Court certainly should not authorize the expenditure of taxpayer funds for an investigator to intrude upon the private lives of the jurors," since such a request "could be made by any prisoner in any case." JA 367-368. Curry also opposed funds for a ballistics expert, stating: "The issue in this case was not one of ballistics; rather it was a question of which defendant shot which victim: if the jury believed Cruse's testimony, then Williams fired all five of the shots that killed Mr. Keller and two of the three shots that killed Mrs. Keller; if the jury

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[9] In Virginia, the state supreme court has exclusive jurisdiction over capital habeas petitions. Va. Code § 8.01-654(C)(1). The petition is filed in the Virginia Supreme Court, and that court determines in the first instance whether to grant funds for investigative and expert services, whether to grant discovery, and whether an evidentiary hearing is required. The circuit court can conduct an evidentiary hearing on such a petition "only if directed to do so by order of the Supreme Court." *Id.*

believed Williams' testimony, then Cruse fired all three shots that killed Mrs. Keller and all but one of the shots that killed Mr. Keller." JA 366-367.

White tried other ways to obtain relevant information. On December 1, 1995, White again wrote to Curry and explained that he had been "unable to locate" Cruse. Cruse had been placed in protective custody, and the prison would not disclose his location. White went on to say: "I don't care where I speak to him but I think I am entitled to speak with him. I think I am also entitled to know the circumstances surrounding his entry into protective custody. I find it hard to believe that arrangements for this were not made prior to his testimony against my client." JA 362. Curry replied: "Cruse, in fact, is imprisoned outside Virginia. I will not reveal, however, his location to you or anyone else who might disclose the location to your client. . . . " JA 363.

White filed another motion in the Virginia Supreme Court on January 10, 1996, requesting the production of and discovery relating to Cruse. White informed the court that "the files of trial counsel and the record in this case do not adequately reflect information or discovery relating to plea agreements between the Commonwealth and . . . Cruse. Accordingly, counsel must talk to Mr. Cruse and obtain records relating to his incarceration." JA 372. Curry opposed the motion, asserting that Williams "is not entitled to discovery" and that the request was merely a "fishing expedition." JA 374-375. Curry also asserted that the "plea arrangements between the prosecution and Cruse were fully disclosed." JA 374.

In January 1996, White filed an amended state habeas petition asserting – among other claims not pertinent to the issues now before this Court – a claim that the Commonwealth had failed to reveal an agreement with Cruse.[10] White

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[10] The state's response to the amended petition contained an affidavit from Cruse's attorney, Donald Blessing, and an affidavit from one of the

requested an evidentiary hearing, the right to conduct discovery, and funds to retain experts. JA 392.

On March 18, 1996, the Virginia Supreme Court dismissed Williams' state habeas petition without remanding the case for an evidentiary hearing or hearing oral argument. The court concluded that some claims were procedurally barred; as for the remaining claims, the court's entire discussion was: "finding no merit in petitioner's remaining allegations, the Court is of the opinion that the writ of habeas corpus should not issue as prayed for." JA 444-445. The court denied Williams' motions for investigative and expert services, for the production of Jeffrey Cruse, and for discovery relating to Jeffrey Cruse. *Id.*

Federal habeas corpus proceedings

1. The initial district court proceedings

On July 2, 1996, the United States District Court for the Eastern District of Virginia granted a stay of execution and appointed counsel. Pursuant to court order, counsel filed a habeas corpus petition on November 20, 1996. The petition re-raised Williams' *Brady* claim based on the Commonwealth's failure to disclose any formal or informal deals or arrangements with Cruse. It also contained several new claims that are relevant here.

First, it raised a new *Brady* claim based on counsel's discovery of an undisclosed pretrial, confidential report of a psychiatric examination of Cruse. The report, which was prepared in September 1993, several months prior to Williams' trial, stated:

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two prosecutors, Robert Woodson, denying that any agreement existed. Von Schuch, the lead prosecutor who presented Cruse's testimony at trial and who told the jury "if he lies, he dies," did not submit an affidavit; nor did Cruse.

> [Cruse] has little recollection of [the Keller murders] . . . , other than vague memories, as he was intoxicated with alcohol and marijuana at the time.

JA 495. This report had been discovered in Cruse's court file by an investigator employed by appointed counsel, the Virginia Capital Representation Resource Center, during the federal habeas corpus proceedings. JA 620-621. Williams' state habeas counsel had reviewed Cruse's court file for the specific purpose of determining whether it contained information that shed light on the nature of the "deal" Cruse had with the Commonwealth or information that might be useful in attacking Cruse's credibility. According to state habeas counsel's affidavit, this psychiatric report was not in the file at the time he examined it prior to filing Williams' state habeas petition: "I have no recollection of seeing this report in Mr. Cruse's court file when I examined the file. Given the contents of the report, I am confident that I would remember it." JA 625-626.

The federal habeas petition also asserted that Williams' Sixth and Fourteenth Amendment rights were violated when Bonnie Stinnett was seated as a juror. During the investigation conducted in connection with preparing the federal petition, counsel serendipitously discovered that Stinnett, the jury foreperson, had previously been married to Sheriff Meinhard,[11] who was the father of her four children. Meinhard was involved in the Keller investigation from the start;[12] he interviewed Cruse and testified at trial. Counsel also discovered

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[11] Appointed federal habeas counsel, at their own expense, hired an investigator to interview the jurors who served in Mr. Williams' case. During the interviews, two jurors who knew Ms. Stinnett referred to her by her married name of "Meinhard." This fortuitous event initially revealed the relationship. JA 492-494.

[12] Meinhard received the call about a fire at the Keller home and went to the house. JA 67. He prepared the missing persons report and issued the BOLO for their stolen automobile. *Id.* Later that day, Verena James called Meinhard to say that she had dropped Cruse and Williams off near the Kellers' residence the night before. JA 68. Meinhard then picked Cruse up, brought him to the station, and interrogated him. *Id.*

that one of Williams' prosecutors, Robert Woodson, represented Stinnett in her divorce from Sheriff Meinhard. Both Stinnett and prosecutor Woodson had remained silent when the trial judge asked the following questions:

> ◆ "Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?" [Robert Woodson's name had been previously read to the jury.]
>
> ◆ "Are any of you involved in law enforcement?"
>
> ◆ "Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard?"

JA 33; 39-40.

On April 13, 1998, the district court dismissed most of Williams' claims but ordered an evidentiary hearing on the *Brady* claim involving the undisclosed deal with Cruse and the claims involving Stinnett, Meinhard and Woodson. With respect to Williams' contention that the prosecution failed "to disclose to the defense that Cruse did in fact have an agreement with the Commonwealth for a life sentence in exchange for his testimony against Williams," JA 575-576, the district court reviewed all of the circumstances of Cruse's testimony against Williams,[13] the subsequent reduction in Cruse's

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[13] The district court noted the following testimony which was possibly suggestive of some type of arrangement:

> Q: You've indicated to the jury you're charged with capital murder right now; is that correct?
>
> A: Correct.
>
> Q: It is your understanding that the Judge is going to decide whether you live or die?
>
> A: Correct.

JA 159; 577-578. The court also referred to the following statement made by the Commonwealth's Attorney during his summation: "[Cruse] sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. And like he told you right now his back is against the wall; if he lies, he dies, and that is his situation."

charges, the timing of Cruse's guilty plea,[14] the Commonwealth's recommendation that Cruse should be sentenced to life imprisonment as a result of his testimony at Williams' trial, and Cruse's centrality to the Commonwealth's case; on this basis, it concluded that "Williams was entitled to know whether any informal understanding had been reached between Cruse and the Commonwealth prior to or at the time of Cruse's testimony at trial. . . . " JA 577-580.[15] The court explained that "[h]ad the jury known that Cruse had some sort of agreement, understanding, or expectation with the Commonwealth regarding his sentence for the Keller murders, there is little doubt that their assessment of Cruse's credibility would have been affected." JA 580.

With respect to the Stinnett/Meinhard/Woodson claims, the district court ordered a hearing because:

> [t]here is no evidence that state habeas counsel knew or could have known of Juror Stinnett's relationship to Deputy Meinhard absent disclosure by the prosecutor. Because Prosecutor Woodson never notified the court or defense counsel of his prior representation of Deputy Meinhard or of his knowledge of Deputy Meinhard's relationship to Juror Stinnett, the Court finds that this information was not reasonably available to defense counsel and that they were unable to know of this issue.

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[14] Cruse pled guilty to the capital murder of Mrs. Keller several weeks after Williams was sentenced to death. The capital murder charge arising from the death of Mr. Keller was reduced to first degree murder as a principal in the second degree.

[15] The Commonwealth submitted a second affidavit from Cruse's counsel, Blessing, in federal court in which Blessing stated that "[a]t the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth." JA 502.

JA 558. Thus the district court concluded that there was "cause and prejudice" to justify raising these claims for the first time in federal court. *Id.*[16]

The district court concluded that Williams was not entitled to an evidentiary hearing on his claim that the Commonwealth failed to disclose the psychiatric evaluation of Cruse. The court agreed with Williams that the "Commonwealth failed to provide this report to Williams' defense counsel- . . . despite being ordered to disclose all Brady material." JA 559. It agreed with Williams that "defense counsel were entitled to rely on the belief that the prosecution would comply with the Constitution." JA 560. It also agreed with Williams that "Cruse played a critical role in the Commonwealth's case against Williams" because the two men "offered dramatically different versions of the shootings." *Id.* Indeed, the district court believed that "Cruse's testimony on the triggerman issue and his credibility as a witness determined who would be convicted of capital murder." *Id.* And it

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[16] The Commonwealth submitted an affidavit from Woodson stating that he "would not have expected [Stinnett] to say that she was 'related' to her ex-husband" because, in his opinion, "people who are related only by marriage are no longer 'related' once the marriage ends in divorce." JA 629-630. Woodson said he had no recollection of Stinnett having been asked if she was "related to any of the witnesses in the case." *Id.* Woodson also averred that he had "no recollection of having been involved as a private attorney in the divorce proceedings between Claude Meinhard and Bonnie Stinnett." *Id.* Stinnett submitted an affidavit stating: "I did not respond to the judge's question because I did not consider myself 'related' to Claude Meinhard in 1994. . . . Once our marriage ended in 1979, I was no longer related to him." JA 627-628. The affidavit recited: "I was also asked by the judge whether I or any member of my immediate family had ever been represented by any of the attorneys in the case. I did not respond to this question for several reasons. First, I do not think of myself as ever having been 'represented' by an attorney for any reason. When Claude and I divorced in 1979, the divorce was uncontested and Mr. Woodson drew up the papers so that the divorce could be completed. Since neither Claude nor I was contesting anything, I didn't think Mr. Woodson 'represented' either one of us." *Id.*

believed that information that "Cruse had little to no recollection of the murders would have undoubtedly undermined his credibility and cast doubt on his ability to remember the shootings with such detail." *Id.* However, the court ultimately denied Williams an evidentiary hearing because "Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel." JA 560-561. Williams filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), attaching the affidavit of Eric White described above. The motion was denied without opinion. JA 633.

2. The Commonwealth's emergency stay proceedings

The Commonwealth immediately filed an Application for an Emergency Stay and a Petition for Writ of Mandamus and Prohibition in the Court of Appeals for the Fourth Circuit. On May 27, 1998, a divided three-judge panel granted the Commonwealth's motion, holding that the district court should apply 28 U.S.C. § 2254(e)(2)(A) and (B) to Williams' claims involving the deal with Cruse and the Stinnett/Meinhard/Woodson imbroglio. *In Re: Fred W. Greene,* No. 98-17 (4th Cir., May 27, 1998) (JA 635-636):

> [The Antiterrorism and Effective Death Penalty Act] establishes certain limits on a court's ability to conduct an evidentiary hearing where an applicant has failed to develop the factual basis of a claim in state court. In such cases, the court may hold an evidentiary hearing only if the claim satisfies two requirements. First, the claim must rely on either certain retroactive new rules of constitutional law or a "factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. sec. 2254(e)(2)(A). Second, the underlying facts must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would

> have found the applicant guilty of the underlying offense." *Id.* sec. 2254(e)(2)(B). In granting the evidentiary hearing, the district court did not apply these requirements. Instead it simply cited several pre-AEDPA cases to support its conclusion that defendant has demonstrated cause and prejudice. This, we believe, was error.

3. The remand proceedings in the district court

On remand, the district court expressed misgivings because the "plain meaning of section 2254(e)(2) prohibits a federal evidentiary hearing only in those cases where a petitioner has been afforded an opportunity to develop evidence in state habeas court but has failed to do so," *Williams v. Netherland*, 6 F. Supp. 2d 545, 547 (E.D. Va. 1998); and, in the district court's view, Williams "did not 'fail to develop' the factual basis of his claims," *id.* The court noted that

> [t]he record is replete with examples of state habeas counsel's numerous attempts to obtain the evidence required to discover, present, and prove Williams' claims – including informal attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied Williams the opportunity to develop the necessary facts by denying all of Williams' requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record.

JA. 643-644.

But "despite its concerns over the applicability of section 2254(e)(2) to cases such as the present one," the district court believed that it had "been directed by its Court of Appeals" to deny Williams an evidentiary hearing unless he could meet the exceptions contained in § 2254(e)(2)(A) and (B). JA 644. Finding that even if Williams could meet subsection (A)'s retroactive-new-law or new-factual-predicate requirements, he could not make the "requisite showing of innocence" under

subsection (B), the district court dismissed his petition without a hearing. JA 646.

4. The appeal to the Fourth Circuit

On appeal, Williams argued that he was entitled to a hearing on his claims. He maintained that § 2254(e)(2) comes into play only when a habeas petitioner " 'has failed to develop the factual basis of a claim in State court,' " *Williams v. Taylor*, 189 F.3d 421, 426 (4th Cir. 1999) (JA 658), and that *he* did not fail to develop facts; rather, "the Supreme Court of Virginia denied his requests for discovery, a hearing, and expert and investigative assistance." *Id.*

Concerning Williams' claim that the Commonwealth had concealed a testimonial deal with Cruse, the panel found that the state court correctly rejected this claim because, in state habeas, the "Commonwealth supplied two affidavits, one from Woodson and one from Cruse's trial counsel, Donald Blessing, stating unequivocally that Cruse had no agreement," JA 664, and "there is no reason for federal courts to revisit the state court's determination in a federal hearing in view of the unrefuted evidence." JA 665. The panel went on to say that even if Williams had demonstrated the existence of an agreement between Cruse and the Commonwealth, he could not show materiality in light of "Williams' own testimony that he was at least an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head." JA 665-666.

As for Williams' *Brady* claim based on the Commonwealth's failure to disclose Cruse's psychiatric report, the panel found that Williams had failed to develop the factual basis of this claim in the state courts. "Williams provides nothing more than an affidavit from his state habeas counsel attesting to 'no recollection of seeing this report in Mr. Cruse's court file.' In light of the fact that Williams' federal habeas counsel located the evaluation in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence. Indeed, that failure tends to show that counsel did *not* act diligently." JA 660.

With regard to the Stinnett/Meinhard/Woodson claims, the panel concluded that Williams had failed to develop the facts supporting them in state court because "[t]he documents supporting Williams' . . . claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well." JA 659. While acknowledging that Williams' request for an investigator to pursue exactly this type of claim was denied by the state courts, the panel found state habeas counsel's application insufficient because counsel "alluded vaguely to 'irregularities, improprieties and omissions' with regard to jury selection and asked for an investigator to examine 'all circumstances relating to the empanelment of the jury and the jury's consideration of the case.' " JA 659. In the Fourth Circuit's view, this request alone did not alert the "state habeas court to any specific claim" and thus "the failure to develop the . . . claim was . . . attributable to Williams, not to the Supreme Court of Virginia's rejection of a fishing expedition request." JA 659-660.[17]

SUMMARY OF ARGUMENT

Section 2254(e)(2), as amended by AEDPA, prohibits a federal district court from holding an evidentiary hearing only when "the applicant has failed to develop the factual basis of a claim in State court proceedings. . . . " The plain meaning of the statutory language, the unmistakable similarity between

[17] The panel also found that for essentially the same reasons, under "pre-AEDPA law . . . Williams can show neither cause nor prejudice from his failure to raise the aforementioned Sixth Amendment and Brady claims in state court." 189 F.3d at 427. On the issue of cause, the panel reiterated its "lack of diligence" discussion. On the issue of prejudice, the panel reiterated that, "[a]s we have indicated [in the § 2254(e) discussion], Williams' trial testimony alone was enough to convict him." *Id.*

the text of the statute and the language of *Keeney v. Tamayo-Reyes*, and the policies underlying AEDPA indicate that § 2254(e)(2) prevents a federal evidentiary hearing only where any inadequacies in the state court record are attributable to the petitioner.

Williams' state habeas counsel's diligent efforts to discover and develop facts supporting his claims during state habeas corpus proceedings were thwarted by the Commonwealth of Virginia: his formal and informal requests for discovery were rebuffed; his motions for investigative and expert assistance were denied; and the state court refused to conduct an evidentiary hearing. Because petitioner did all that can reasonably be expected to adequately develop the record, § 2254(e)(2) does not preclude a federal evidentiary hearing in this case.

For the same reasons petitioner did not "fail to develop" his claims in state court proceedings, *i.e.*, state interference, he has also established "cause" for the failure to present three of his four claims in state court. Furthermore, petitioner was prejudiced by each of the constitutional errors. The Commonwealth's nondisclosure of a psychiatric report showing Cruse had only vague recollections of the crimes deprived petitioner of material evidence undermining Cruse's testimony that petitioner had committed acts making him guilty of capital, rather than first-degree, murder. The prejudice was compounded by the prosecution's failure to reveal the existence of an agreement with Cruse. The silence of Juror Stinnett and Commonwealth Attorney Woodson likewise worked to petitioner's actual and substantial disadvantage by depriving him of the information necessary to challenge Stinnett for cause, or at the very least to remove her from the jury panel peremptorily, and by resulting in the seating in a capital trial of a jury foreperson who harbored actual bias.

ARGUMENT

A. Introduction.

The issue in this case is straightforward: Does 28 U.S.C. § 2254(e)(2), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, preclude a federal district court from holding an evidentiary hearing on four constitutional claims presented in Williams' petition for habeas corpus? The court of appeals said yes, concluding that Williams "failed to develop" the factual basis of his claims in state court, as that phrase is used in section 2254(e)(2). But this result flouts the plain language of the statute because the record is clear that Williams did all that he could reasonably be expected to do in state court, and that the state-court record was inadequate as a result of the prosecution's persistent concealment of information and the state court's persistent denial of Williams' requests for the resources necessary to unearth that information.

At the outset, Williams acknowledges that three of the four constitutional claims at issue were not raised in state court and thus are presumptively procedurally defaulted because they are time-barred. *See* Va. Code § 8.01-654.1. To obtain an adjudication of the merits of these claims in federal habeas, Williams must establish "cause and prejudice." *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Strickler v. Greene*, 119 S.Ct. 1936, 1949 (1999) ("[W]e must first decide whether that default is excused by an adequate showing of cause and prejudice."). Doctrinally, the *Sykes* issue is independent of the question of Williams' right to an evidentiary hearing under § 2254(e)(2). But the two issues became intertwined at an earlier stage of this case when the district court, finding "cause and prejudice," scheduled an evidentiary hearing on several of Williams' claims. The Commonwealth filed an "Application for Emergency Stay and Petition for a Writ of Mandamus and Prohibition" in the court of appeals, contending that § 2254(e) barred an evidentiary hearing. The court of appeals sustained that contention by referring to § 2254(e)(2);

and the subsequent course of the litigation was shaped by this turn.

In the following argument, Williams discusses the procedural default issue separately. He discusses the § 2254(e)(2) issue first, both because it was the basis of the court of appeals' decision below and because it applies to all four of Williams' claims, whereas procedural default applies to only three. Discussing § 2254(e)(2) first also proves economical, because the facts and reasoning by which Williams shows that he did not "fail to develop" the factual basis for his federal claims in state court will *a fortiori* establish "cause" for any procedural bar arising from the fact that three of his claims were raised initially in federal court.

As a framework for the detailed legal analysis that follows, Williams will briefly outline the principles that he believes govern procedural default and restrictions on federal evidentiary hearings when facts supporting federal claims are not developed in the state courts:

(1) *Sykes*' "cause and prejudice" test applies when a federal habeas petition contains claims that are procedurally barred under applicable state law because they were not previously raised in state court. "Cause" can take many forms, but generally falls into one of two broad categories: evidence that a factor external to the defense impeded the petitioner from presenting his or her claim pursuant to a State's rules, *Amadeo v. Zant*, 486 U.S. 214 (1988); or evidence that the petitioner's counsel rendered ineffective assistance by Sixth Amendment standards in failing to raise the claim, *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Although "prejudice" has not been given "precise content," *United States v. Frady*, 456 U.S. 152, 168 (1982), it is generally understood to mean that the error worked to the petitioner's "actual and substantial disadvantage." *Id.* Where state misconduct is involved, prejudice is established by a showing that but for the misconduct, "there is a reasonable probability that [the] . . . conviction or sentence would have been different. . . . " *Strickler*, 119 S.Ct. at 1955.

(2) When a federal habeas petitioner who is entitled to an adjudication of a claim on the merits (either because s/he has exhausted and preserved the claim or because s/he has successfully overcome a procedural default of the claim) seeks to develop evidence that was not developed in state court, the applicable rule is provided by § 2254(e)(2). Prior to AEDPA, it was provided by *Townsend v. Sain*, 372 U.S. 293 (1963), and *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *Keeney* qualified *Townsend* by holding that if the petitioner "failed" to develop the facts in state court, in the sense that s/he was at fault for the inadequate record, a hearing could not be conducted *unless* the petitioner demonstrated cause and prejudice. *Keeney*, 504 U.S. at 8.[18] "Cause" carried the same

[18] *Keeney* addressed "whether the deliberate bypass standard is the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings." *Keeney*, 504 U.S. at 5. Tamayo-Reyes had been granted a hearing in state post-conviction proceedings on his claim that his guilty plea to manslaughter was invalid because his translator had not fully translated to him the *mens rea* element of the offense. In federal court, he again requested an evidentiary hearing, relying on the "fifth circumstance" of *Townsend v. Sain*, 372 U.S. 293 (1963), pursuant to which a habeas petitioner was entitled to a federal hearing if "the material facts were not adequately developed at the state-court hearing," *id.* at 313, so long as the petitioner had not deliberately bypassed available state-court procedures for fact development. *Id.* at 317.

Stressing Tamayo-Reyes' "negligent failure to develop the facts in state court proceedings," *id.* at 8-9, a majority of this Court overruled *Townsend*'s use of the "deliberate bypass" standard and adopted in its place the "cause and prejudice" requirement already applicable to habeas petitioners who failed to abide by state procedural rules, *Sykes*, *supra*, and those who committed abuse of the writ, *McCleskey v. Zant*, 499 U.S. 467 (1991). *Keeney*, 504 U.S. at 5-6; 6-7. In support of this partial restriction on the availability of federal evidentiary hearings, the Court observed that "encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance," and that "[i]t is hardly a good use of scarce judicial resources to duplicate factfinding in federal court merely because a petitioner has negligently

doctrinal meaning under *Keeney* as it does under *Sykes*. *Id.* at 10. In practice, however, "cause" in the *Keeney* context almost always took the form of ineffective assistance of counsel because the other major category of "cause" under *Sykes* – an external impediment – seldom, if ever, came into play under *Keeney*. (An external impediment would ordinarily exclude the circumstance that triggers a *Keeney* bar in the first place: the petitioner's "failure to develop the facts in state-court proceedings," *Keeney*, 504 U.S. at 11, through negligence or sandbagging.)

(3) AEDPA's § 2254(e)(2) works much the same way as *Keeney* but modifies *Keeney*'s exceptions. In place of the "cause and prejudice" required to overcome *Keeney*'s restrictions on the right to a federal evidentiary hearing, AEDPA requires a showing of *either* a new rule of constitutional law made retroactively applicable by this Court *or* newly discovered evidence not previously discoverable through the exercise of due diligence, ***and, in addition***, a showing of actual innocence by clear and convincing evidence. § 2254(e)(2)(A) and (B).

Williams acknowledges that this modification of *Keeney*'s exceptions would preclude an evidentiary hearing in his case if the exceptions were at issue. But they are not. The question in Williams' case is whether the case *falls within the rule of § 2254(e)(2) in the first place* on the ground that he "failed to develop" the facts supporting his claims in state court within the meaning of that language in the opening clause of § 2254(e). As Williams will now establish, he did not "fail" to do anything that he reasonably could have done in state court; the prosecution and the Virginia Supreme Court were responsible for the inadequacy of the state-court record;

failed to take advantage of opportunities in state-court proceedings." *Id.* at 9. Likewise, the Court explained that "[t]he state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings." *Id.*

thus, § 2254(e)(2) does not bar Williams' right to a federal evidentiary hearing on his well-pleaded claims of constitutional violation.

B. A federal habeas petitioner has "failed to develop the factual basis of a claim" in state court only if s/he is at fault for the inadequate state-court record.

Section 2254(e)(2) provides that, "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that [s/he comes within specified exceptions]." The federal courts of appeals have uniformly concluded that this is not a strict-liability statute but bars a federal evidentiary hearing only if inadequate factual development in state-court proceedings is attributable to some failing on the part of the petitioner.[19]

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[19] *See Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999), *quoting Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998) ("We agree that 'where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, § 2254(e)(2) will not preclude an evidentiary hearing in federal court' "); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998) ("where, as here, a habeas petitioner has diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so, § 2254(e)(2) does not apply"); *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998) ("an applicant 'fail[s]' to develop the evidence supporting a claim only if he or she relinquishes an opportunity to introduce evidence or neglects to seek such an opportunity"); *Wilkins v. Bowersox*, 145 F.3d 1006, 1016 n.6 (8th Cir. 1998) (because lack of factual development in state court was not attributable to petitioner, court of appeals did not need to reach question whether § 2254(e), as amended, applied to this pre-AEDPA case); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998) ("a petitioner cannot be said to have 'failed to develop' a factual basis for his claim unless the undeveloped record is a result of his own decision or omission"); *Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997) ("Section 2254(e)(2) . . . applies only when 'the applicant has failed to develop the factual basis of a claim in State court proceedings.' 'Failure' implies omission – a decision not to introduce evidence when there was an opportunity, or a decision not to seek an opportunity."); *Love v. Morton*, 112 F.3d 131, 136 (3rd Cir. 1997) ("we are unwilling to conclude that [petitioner] failed to develop the factual basis of his claim in the state court proceedings. We conclude that factors other than the defendant's action prevented a factual record from being developed").

This reading is compelled both by the plain meaning of the statute and by the unmistakable resemblance of the statute to the language employed by this Court in *Keeney*. Because § 2254(e)(2) begins with a conditional "if" clause, the section's restriction upon federal evidentiary hearings turns upon the meaning of "failed" in this clause: "If the applicant has **failed** to develop the factual basis of a claim. . . . " "Failed" is commonly defined as "leav[ing] some possible or expected action unperformed or some condition unachieved," Webster's Third New International Dictionary (1993) (def. h), "fall[ing] short of success in something expected," The Random House Dictionary of the English Language, 2d ed. (1987) (def. (1)1), and being "at fault," The Oxford English Dictionary, 2d ed. (1989) (def. III 11.a).[20] Applying this common understanding of "failed" to § 2254(e)(2) produces the unmistakable result[21] that the section comes into play only if a habeas petitioner neglected to take advantage of an available opportunity to develop the facts supporting his claims in state-court proceedings.

Moreover, Congress used the same phrase – "failed to develop" – to trigger § 2254(e)(2) as was used in *Keeney* to trigger the restriction on the right to a federal evidentiary

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[20] "Fail" and "fault" have the same etymological root, the Latin "*fallere*." *See* Eric Partridge, Origins, A Short Etymological Dictionary of Modern English, p.97 (McMillan Co. 1966).

[21] "[W]ords in a statute are assumed to bear their 'ordinary, contemporary, common meaning,' " *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997), *quoting Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (additional quotation marks omitted).

hearing.[22] "Where Congress uses terms that have accumulated settled meaning . . . a court must infer . . . that Congress means to incorporate the established meanings of these terms." *N.L.R.B. v. Amax Coal Co., a Division of Amax, Inc.*, 453 U.S. 322, 329 (1981). In *Keeney*, this Court used the phrase "failed to develop" to describe the omissions of "a petitioner [who] has negligently failed to take advantage of opportunities [to develop facts] in state-court proceedings." *Keeney*, 504 U.S. at 9. There is nothing to indicate that Congress, enacting § 2254(e)(2) less than four years later, intended to deviate from the meaning attached to "failed to develop" in *Keeney*.[23] *See Weeks v. Bowersox*, 119 F.3d 1342, 1354 n.12 (8th Cir. 1997) ("Where omission of material facts from the state court record is attributable to the petitioner, the new Act both codifies and narrows the [*Keeney v.*] *Tamayo-Reyes* standard").

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[22] The parallels between *Keeney* and § 2254(e)(2) are evident from the following chart:

A federal evidentiary hearing is barred if:	
Keeney v. Tamayo-Reyes	28 U.S.C. § 2254(e)(2)
the lack of factual development is a result of petitioner's "*failure to develop the facts in state-court proceedings. . . .*" 504 U.S. at 11.	"the applicant has *failed to develop the factual basis of a claim in State court proceedings. . . .*"

[23] *See Molzof v. United States*, 502 U.S. 301, 307 (1992) ("A cardinal rule of statutory construction holds that: '[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.' ") (internal citation omitted).

C. Because the inadequate state-court record here is in no way attributable to Williams or his state habeas counsel, he did not "fail to develop" the factual basis of his claims in state court.

No plausible argument can be made that a habeas petitioner has failed to develop the factual basis of his claims in state court when relevant information is unconstitutionally concealed by prosecuting authorities and their ancillary agencies, and when requests for both discovery and the financial resources necessary to conduct an independent investigation are denied by the state courts. In such circumstances, there is " 'interference by [state] officials' " that makes it " 'impracticable' " to fully develop the claim. *Keeney*, 504 U.S. at 10, n.5, *quoting Brown v. Allen*, 344 U.S. 443, 486 (1953). And that is precisely what happened in Williams' case.

1. Efforts to develop the facts in state court

As related above, Williams requested a federal hearing on four claims: (1) the prosecution violated *Brady v. Maryland* when it did not reveal a psychiatric report impeaching Cruse's credibility; (2) the prosecution further violated *Brady* by not disclosing a deal with Cruse; (3) Williams' Sixth and Fourteenth Amendment rights were violated by Juror Stinnett's acceptance on the jury, in light of her undisclosed relationships to Deputy Sheriff Meinhard and Commonwealth's Attorney Woodson; and (4) the same rights were violated by Woodson's failure to disclose that Stinnett was his former client and had been married to Meinhard.

The trial record in this case revealed no indication that a psychiatric report existed which contained a statement by Cruse that he had only vague memories of the Kellers' murders. Nor was there any clue that Juror Stinnett, Commonwealth Attorney Woodson and Sheriff Meinhard had concealed their relationships with each other throughout the trial. Diligent state habeas counsel could not have been alerted to this information by reviewing the record.

Yet Williams' state habeas counsel, Eric White, did not rely solely on the trial record. White recognized his responsibility to independently investigate, discover and develop all potential constitutional claims of error for collateral relief. He made repeated attempts to do so. As the district court found:

> [t]he record is replete with examples of state habeas counsel's numerous attempts to obtain evidence required to discover, present, and prove Williams' claims – including informal attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied Williams the opportunity to develop the necessary facts by denying all of Williams' requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record.

JA 643-644. White was faced at every turn with stonewalling by the Attorney General's office; and the state supreme court refused to provide him with any investigative resources, discovery or an evidentiary hearing.

For example, White wrote to prosecutor Von Schuch and Senior Assistant Attorney General Curry requesting "[a]ll reports of physical or mental examinations . . . performed upon any prosecution witnesses" and "cop[ies] of all medical or psychiatric reports known to the prosecutor concerning any witness the prosecutor called at trial which arguable [sic] affected the witness's credibility, ability to perceive, or relate or recall events." See page 9, *supra* Even the most parsimonious reading of these requests encompassed the Cruse psychiatric report. Instead of providing the information, Curry insisted that he had "no intention . . . of [reviewing the files] for the purpose of identifying material, exculpatory evidence." Curry justified this stance by pointing to the "lengthy request for exculpatory evidence" to which "the Commonwealth responded" prior to trial, and by stating that he was unaware of any "authority that requires the Commonwealth . . . to comply with such a request from petitioner's

counsel."[24] *Id.* Under these circumstances, what options were available to state habeas counsel other than to accept the Commonwealth's representation that it had fully complied with *Brady? See Strickler*, 119 S.Ct. at 1951 (given the Commonwealth's representation in state habeas proceedings that the petitioner had been provided with all information known to the prosecution, "petitioner had no basis for believing the Commonwealth had failed to comply with *Brady* at trial").

White's efforts to ascertain the existence of a deal between the Commonwealth and Cruse were similarly rebuffed. He specifically asked for "[a]ny and all . . . considerations or promises of consideration given . . . by any law enforcement officials . . . to or on behalf of any witness the prosecutor called at trial. . . . " *Id.* This request was summarily rejected by the Commonwealth. White then asked the Virginia Supreme Court for "an investigator to examine issues relating to the testimony and status of the co-defendant, Jeffrey Cruse . . . ," and informed the court that counsel's own efforts to locate and interview Cruse had been unsuccessful. The Commonwealth opposed this motion as "frivolous," and the motion was denied. White, still unsatisfied, wrote again to Curry saying that White was unable to locate Cruse because Cruse had been placed in protective custody and asserting that White was entitled to speak to Cruse to determine if Cruse had testified pursuant to any arrangement. Once again, Curry's answer was: "I will not reveal . . . [Cruse's] location to you or anyone else who might disclose the location to your client, Michael Williams." Still White persisted. He filed another motion in the Virginia Supreme Court requesting that

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[24] Curry's second justification conflicts with this Court's recognition that, while the prosecutor's . . . duty to [disclose] all significant evidence suggestive of innocence or mitigation . . . is enforced [at trial] by the requirements of due process, . . . after a conviction the prosecutor also is bound by the ethics of his office" to disclose such information. *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (citations omitted).

Cruse be produced and that counsel be provided with discovery materials related to Cruse. Using what information he had been able to glean, White informed the Virginia Supreme Court that "the files of trial counsel and the record in this case do not adequately reflect information or discovery relating to plea agreements between the Commonwealth and Jeffrey Allen Cruse," so that "counsel must talk to Cruse and obtain records relating to his incarceration." In keeping with the Commonwealth's unrelenting pattern of obstruction, Curry opposed White's request, labeling it a "fishing expedition," asserting that White was "not entitled to discovery," and representing that the "plea arrangements between the prosecution and Cruse were fully disclosed." White's motion was denied by the Virginia Supreme Court. What more could White have done to develop facts regarding a deal with Cruse?

White's attempts to investigate whether his client was tried by a fair, impartial jury met the same government interference. Responding to his motion to the Virginia Supreme Court for investigative services, the Commonwealth argued that the "Court certainly should not authorize the expenditure of taxpayer funds for an investigator to intrude upon the lives of the jurors." See page 10, *supra*. White, who lacked means to finance the investigation and who also lacked any personal ties to the local community that might have alerted him to the relationships between Juror Stinnett, Commonwealth Attorney Woodson, and Sheriff Meinhard, had no reasonable means of uncovering those relationships. It was only after two other jurors referred to Stinnett by her married name – Meinhard – in interviews with an investigator later hired by federal habeas counsel, that the facts about her relationships with the sheriff and prosecutor came out.

In sum, appointed state habeas counsel did all he could do – without good faith cooperation by the Commonwealth's attorneys, without discovery, without financial resources, without a state-court hearing and the accompanying subpoena power – to develop the relevant facts. The district court

recognized as much, observing that, "the Court is hard-pressed to find that Williams 'failed to develop the factual basis of his claims in State Court proceedings,' " *Williams*, 6 F. Supp. 2d at 547. The court of appeals, however, demanded more.

2. The court of appeals' distortions of § 2254(e)(2)

First, the Fourth Circuit faulted White for insufficient specificity in his requests for discovery and financial assistance, requiring that "a petitioner must tie his requests to his specific claims and state with some particularity the need for assistance." 189 F.3d at 426. But counsel in state habeas proceedings are not supposed to speculate.

> Mere speculation . . . is unlikely to establish good cause [under Virginia's rules] for a discovery request on collateral review. *Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support.* . . . . The presumption, well established by " 'tradition and experience,' " that prosecutors have fully " 'discharged their official duties' " . . . is *inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.*

Strickler, 119 S.Ct. at 1950-51 (emphasis added).

Here, White reviewed the information available to him and inferred from it that a deal may have existed between Cruse and the Commonwealth. Based upon that inference, he properly pleaded the existence of a deal and made specific, repeated discovery requests in an effort to gather additional facts. White did not, however, have any information to indicate either that an undisclosed psychiatric report on Cruse

existed or that Juror Stinnett, Commonwealth Attorney Woodson, and Sheriff Meinhard had failed to reveal their relationships. White was therefore in no position to speculate about those issues even if he had been inclined to do so.

The court of appeals further criticized White's inability to find Cruse's psychiatric report, saying that, "[i]n light of the fact that Williams' federal counsel located the . . . [report] in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence." *Williams*, 189 F.3d at 426-27. But state habeas counsel's affidavit flatly states that he reviewed the file in which the report was later located, that he did not see the report, and that, had he seen the report in the file, he would have raised a *Brady* claim in state habeas proceedings based on its contents. See page 13, *supra*. It is fanciful to imagine White would have missed the report if it was in the file when he reviewed the file, since the report contains precisely the type of information White persistently sought through his formal and informal discovery requests. At a minimum, any questions his affidavit may leave concerning the presence of the psychiatric report in the file at the relevant time cannot be summarily resolved against Williams, as the court of appeals did. Rather, such questions should be answered at an evidentiary hearing where the timing of the report's placement in the state court file and its whereabouts before being placed in that file can be determined by an informed factfinder. This is the more appropriate because Cruse's psychiatric report, which is palpably inconsistent with his detailed trial testimony, should have been disclosed by the Commonwealth long before state habeas counsel was even appointed. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) ("the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable").

The court of appeals likewise found fault with state habeas counsel for not discovering Stinnett's divorce records, noting that they have been "a matter of public record since . . . 1979." 189 F.3d at 426. It said that "because

Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well." *Id*. This reasoning, again, neglects to note that before state habeas counsel ever had a duty to investigate Williams' case, Stinnett, Commonwealth Attorney Woodson and Sheriff Meinhard had an obligation – which all three breached – to alert the trial court to their relationship. Although specific questions were asked during *voir dire*, all three stood silent. It is unfair to blame White for Stinnett's, Woodson's and Meinhard's failure to reveal their connections with each other, or for their ability to avoid detection until Williams' case reached federal court.

The court of appeals further ignored the fact that federal habeas counsel only obtained Stinnett's divorce records after an investigator they retained – and White could not afford – heard two other jurors referring to Stinnett as "Bonnie Meinhard" and expressing some surprise that Stinnett had been permitted to serve. Without that chance revelation, federal counsel would never have discovered Stinnett's relationships to Meinhard and Woodson. Thus, unless appointed state habeas counsel has an obligation to investigate the domestic relations of all jurors at his or her own expense, the court of appeals' reasoning fails.

Further, under the court of appeals' rationale, the "if" clause in § 2254(e) will be rendered functionless. Given a rule that *what has been discovered now could have been discovered then*, a habeas petitioner will never get a federal evidentiary hearing. This is simply a covert strict-liability construction of § 2254(e). It ignores the critical question embodied in § 2254(e)(2)'s fault-based "If the applicant failed to develop" clause: *why* did state habeas counsel not discover evidence that was later discovered by federal habeas counsel? The answer to that question in this case lies in the silence of Stinnett, Woodson and Meinhard at trial, and in Virginia's persistent refusal to provide state habeas counsel with the basic tools necessary to ascertain all of Williams' constitutional claims and supporting facts.

The court of appeals' explanation for denying an evidentiary hearing on Williams' claim that the Commonwealth failed to reveal an agreement with Cruse is equally flawed. Citing its "overall obligation of deference to the state court system," *Williams*, 189 F.3d at 428, the Fourth Circuit relied on "unrefuted evidence" that no deal existed in order to uphold the state courts' denial of relief. *Id.* at 429. But this reasoning is perverse: the "evidence" concerning a deal between Cruse and the Commonwealth is "unrefuted" only because Williams has never been given a chance either to interview Cruse or to conduct any discovery related to Cruse's interactions with the prosecution. The district court was plainly right in recognizing that a reasonable reading of the record as a whole suggests the existence of a deal and that "Williams was entitled to know whether any informal understanding had been reached between Cruse and the Commonwealth prior to or at the time of Cruse's testimony at trial." See page 15, *supra*. To allow this reasonable inference to be dodged by characterizing the self-serving affidavits of the prosecutor and Cruse's trial counsel as "unrefuted" without allowing Williams any access to the materials or witnesses necessary to refute them is indefensible. Again, the appropriate course with respect to Williams' contention that Cruse had an agreement with the prosecution is to first give him access to the relevant parties and information and then give him a federal evidentiary hearing if the facts warrant one.

3. The court of appeals' disregard of AEDPA's policy

To hold that Williams "failed to develop" the facts supporting his claims in state court when he was rebuffed in every effort to do so would give a powerful incentive to prosecutors and state judges to obstruct prisoners' efforts to develop the facts bearing on their federal claims. As this Court explained in *Keeney*, creating incentives for federal habeas petitioners to develop the factual bases for their claims in state-court proceedings serves the interest of "channeling

the resolution of claims into the most appropriate forum." *Keeney*, 504 U.S. at 8. To achieve the appropriate channeling, it is equally important to avoid incentives for state officials to impede petitioners' access to, and ability to present, relevant evidence. If the court of appeals' analysis in this case prevails, then the less effort a state devotes to self-corrective procedures, the better protected it is against having its constitutional errors ever corrected. This cannot be right, because it is directly contrary to both the rationale of *Keeney* and Congress' purpose to increase the role of state courts in the collateral review process through passage of AEDPA. *See* 28 U.S.C. §§ 2261-2266 (making more favorable federal habeas rules available to States that provide death-sentenced prisoners with competent post-conviction counsel and necessary resources in state collateral proceedings). As Judge Easterbrook wrote in *Burris*, 116 F.3d at 259: "[T]he word 'fail' cannot bear a strict liability reading, under which . . . a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts. Nothing in § 2254(e) or the rest of the AEDPA implies that states may manipulate things in this manner."

D. There was "cause and prejudice" for Williams' procedural default.

As noted above, three of the four claims at issue in this case – the claim concerning nondisclosure of the Cruse psychiatric report, and the two claims involving Stinnett's relationships with Commonwealth Attorney Woodson and Sheriff Meinhard – were not, and cannot now be, raised in Virginia's state courts. Thus, under *Wainwright v. Sykes*, *supra*, Williams must demonstrate "cause and prejudice" to establish his right to have these claims heard on the merits in federal habeas.

1. "Cause"

This Court has defined "cause" as something "external to the petitioner, something that cannot fairly be attributed to him." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991).

"[A]lthough a 'tactical' or 'intentional' decision to forgo a procedural opportunity normally cannot constitute cause . . . , 'the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." *Amadeo*, 486 U.S. at 221-222, *quoting Reed v. Ross*, 468 U.S. 1, 13-14 (1984) (modification by the Court). In *Strickler*, the Court found "cause" for a petitioner's failure to raise a *Brady* claim in state proceedings based on three factors: (a) the prosecution withheld favorable evidence; (b) the petitioner "reasonably relied" on the prosecution's representations that it was fulfilling its disclosure obligations; and, (c) "the Commonwealth confirmed petitioner's reliance on" those representations "by asserting during state habeas proceedings that petitioner had already received 'everything known to the government.' " *Strickler*, 119 S.Ct. at 1952.

The facts in the present record, previously discussed, are more than sufficient to establish "cause" to excuse Williams' procedural default. As in *Strickler*, Williams' counsel reasonably believed the prosecution's obligation to disclose favorable items like the Cruse psychiatric report had been discharged prior to trial. That reliance was confirmed when state habeas counsel's written request for a category of items encompassing the Cruse report was met with the representation that any such items would have been disclosed pretrial, and that the Commonwealth's representatives would not now undertake to ascertain that all such materials had in fact been disclosed. See page 9, *supra*. Likewise, the " 'factual . . . basis' " for the claims relating to Stinnett was " 'not reasonably available to counsel,' " *Strickler*, 119 S.Ct. at 1949, *quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986), because Stinnett, Woodson and Meinhard failed to disclose their connections to the trial court[25] and because state habeas

[25] The hypertechnical view of the term "related" taken by Woodson and Stinnett in postconviction affidavits executed in April 1998 does nothing to mitigate the dishonesty of their failure to respond. According to the affidavits, it was self-evident that Stinnett's seventeen-year marriage to

counsel was denied the resources necessary to conduct the sort of investigation that ultimately revealed those connections during federal habeas proceedings. *Coleman*, 501 U.S. at 753. In fact, the actual discovery of the relationships between these individuals resulted from "mere fortuity," *Amadeo*, 486 U.S. at 224, made possible by federal habeas counsel's ability to finance an investigation.

Any contrary holding would have a profound adverse impact on state collateral litigation. If the Commonwealth's representations in this case do not constitute "cause," then state attorneys are rewarded for continued withholding of information establishing the existence of constitutional violations. As noted above, such an incentive runs directly contrary to this Court's habeas corpus jurisprudence and the objectives of AEDPA.

2. "Prejudice"

To establish "prejudice" relieving his procedural default, *Sykes*, 433 U.S. at 91, Williams must show that the constitutional error "worked to his actual and substantial disadvantage." *Murray v. Carrier*, 477 U.S. 478, 494 (1986), *quoting United States v. Frady*, 456 U.S. at 170. In cases of state misconduct, this showing of "prejudice" is equivalent to the showing of materiality necessary to prevail on the merits of a *Brady* claim: " 'a reasonable probability' that the result of the

Meinhard could not possibly have been viewed by an objective observer as a relationship warranting further inquiry. This determination, however, was properly reserved to the trial court, not to Stinnett, Woodson or whoever prepared their postconviction affidavits. Woodson's claim that he did not recall having represented either Stinnett or Meinhard in the couple's divorce is incredible, inasmuch as all of these people were residents of a small community where Meinhard was a law enforcement officer. Further, as a prosecutor, it was Woodson's obligation to be aware of whom he had represented, and to make that information known, when it bore upon the fairness of proceedings in which he appeared. At the very least, Williams is entitled to an opportunity to cross-examine Woodson and Stinnett concerning the self-protective assertions made in their affidavits.

trial would have been different if the suppressed document[ ] had been disclosed to the defense." *Strickler*, 119 S.Ct. at 1952.

As to the prosecution's failure to disclose the Cruse psychiatric report, Williams has clearly met this standard. He and Cruse were the only two witnesses to the killings of the Kellers. The physical evidence did not reveal who fired the fatal shots, and this was the crucial question under Virginia law. As the prosecution's witness, Cruse provided an elaborately detailed account of the shootings of Mr. and Mrs. Keller, claiming that Williams instructed him (Cruse) to shoot and that, apart from the single .357 shot which Cruse admitted he fired at Mrs. Keller, all of the shots that killed Mr. and Mrs. Keller were fired by Williams. Williams' own account of the killings directly contradicted Cruse's on the critical issue of who shot the victims. While acknowledging his participation in the other crimes that occurred before and after the Kellers' murders, he maintained that he fired only one shot – the initial shot at Mr. Keller – and that all of the other shots were fired by Cruse. The jury was thus faced with the task of determining whom to believe, Cruse or Williams.[26] Cruse's undisclosed psychiatric report could well have made a difference in the jury's credibility determination. Generated after a September 24, 1993, psychiatric evaluation, the report stated unambiguously: "[Cruse] has *little recollection* of the event, other than *vague memories*, as he was *intoxicated with alcohol and marijuana at the time*." Given this information, Williams' trial counsel could have exposed Cruse's meticulous rendition of who fired which shots at the Kellers as an utter

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[26] Assistant Attorney General Curry has acknowledged that "[t]he issue in this case . . . was a question of which defendant shot the victim: if the jury believed Cruse's testimony, then Williams fired all five of the shots that killed Mr. Keller and two of the three shots that killed Mrs. Keller; if the jury believed Williams' testimony, then Cruse fired all three shots that killed Mrs. Keller and all but one of the shots that killed Mr. Keller. . . . In short, the issue in this case was credibility. . . . " *See* pages 10-11, *supra*.

fabrication concocted to save his own life. And because the Commonwealth's entire case for capital murder was built around Cruse's evolving story, the overall credibility of the prosecution would also have been seriously diminished once it was revealed to the jury that the Commonwealth knew, or had reason to know, that Cruse possessed no genuine memory of the details. *See Kyles*, 514 U.S. at 435 (evidence is material when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict").

The court of appeals was wrong in concluding that the credibility contest between Cruse and Williams was rendered irrelevant because Williams' testimony indicating that he "was at least an accomplice to the rape of Mrs. Keller, and was the first person to shoot Mr. Keller in the head" was "more than sufficient to convict him of capital murder" under Virginia law. *Williams*, 189 F.3d at 427. This is utterly at odds with the governing Virginia rule of law. Under that rule, Williams was guilty of *capital* murder only if the prosecution established that the single shot he admitted firing at Mr. Keller actually inflicted a *fatal* wound. *Cheng v. Commonwealth*, 393 S.E.2d 599, 608 (Va. 1990) ("The Commonwealth has the burden of proving beyond a reasonable doubt that one accused of capital murder was the actual perpetrator of the crime"); *id.* ("The crucial question . . . is whether all the circumstances . . . are sufficient to prove beyond a reasonable doubt that Cheng *actually fired the fatal shots*") (emphasis added).

If Cruse's testimony had been demolished by the psychiatric report, leaving only Williams' own inculpatory testimony, it would have been necessary to determine whether the shot Williams fired was fatal. That question cannot be answered on the basis of the medical examiner's testimony. The court of appeals focused on the medical examiner's statement "that each gunshot wound suffered by Mr. Keller contributed to his death." *Williams*, 189 F.3d at 427. While the medical examiner agreed with the prosecutor that "it

would be fair to say" that the shot which may have been fired by Williams[27] "contributed to the death of Morris Keller," the medical examiner explained that, in her view, "any gunshot wound, even if it might not be lethal, in and of itself [sic] is contributory." *See* page 5, n.4, *supra*. She then said that "Gunshot Wound Number Three" (to Mr. Keller's head) is "contributing and on occasion in and of itself that type of wound can be lethal, but you cannot evaluate that [in this case] because you have two other wounds that actually went into the head." *See* pages 4-5, *supra*; *see also id.* ("Q: And Shot Number Three may have been lethal, but you cannot tell, in and of itself? A: That's correct.").[28]

Given the inconclusiveness of the testimony and the absence of any other evidence establishing that the single shot

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[27] The record does not establish which of Mr. Keller's five gunshot wounds was inflicted as a result of the shot admittedly fired by Williams. In light of the testimony by both Williams and Cruse concerning the positions of the victims relative to their assailants at the time the initial shots were fired, however, it is reasonable to assume that Williams' admitted shot produced one of Mr. Keller's three head wounds. See pages 5-6, *supra*. It is further reasonable to conclude, based upon the fact that Mr. Keller stood up after being shot by Williams, that the wound inflicted by this shot was the one designated "Shot Number Three" by the medical examiner, since that shot "passed through the face," page 6, *supra*, [Kay test. at JA 178], unlike the other two shots to Mr. Keller's head, which "passed into the brain," page 5, *supra* [Kay test. at JA 186]; see also page 5, *supra* [Kay test. at JA 179] ("Q: If [Wound Number Three] . . . was the first gunshot wound inflicted to the deceased, would it be possible for him to exercise, even after the infliction of this wound, some movement prior to the other wounds being inflicted? A: That might be possible.").

[28] Furthermore, on direct appeal the Virginia Supreme Court did not suggest that Williams was guilty of capital murder on his own testimony but, in response to his challenge to the sufficiency of the evidence as to capital murder of Mr. Keller, the court relied expressly upon Cruse's testimony. *Williams v. Commonwealth*, 450 S.E.2d 365, 376 (Va. 1994) ("even if Williams did not kill Mr. Keller on the first shot, the jury could have found that Williams did so later when, according to Cruse, Williams fired the remaining shots into Mr. Keller's body.").

Williams admitted firing was fatal, the Commonwealth's case without Cruse is not "sufficient to prove beyond a reasonable doubt that [Williams] actually fired [a] fatal shot[ ]" as required by Virginia law. *Cheng*, *supra*. And without such proof, he could be found guilty only as a principal in the second degree, subject to prosecution for first degree murder and a sentence of life in prison.[29] Under these circumstances, there exists at least " 'a reasonable probability' that the result of the trial would have been different if the [Cruse report] . . . had been disclosed to the defense." *Strickler*, 119 S.Ct. at 1952, *quoting Kyles*, 514 U.S. at 434.[30]

Furthermore, even if the jury had been able to find Williams guilty of capital murder and therefore *eligible* for the death penalty on the basis of his own inculpatory testimony, there is at least a reasonable probability that the outcome of the subsequent, *selection* stage would have been different. This Court has emphasized that "[w]hat is important at the selection stage is an *individualized* determination on the

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[29] *See Frye v. Commonwealth*, 345 S.E.2d 267, 280 (Va. 1986) ("One who is present, aiding and abetting the actual murder, but who does not actually fire the fatal shot, is a principal in the second degree and may be convicted of no greater offense than first degree murder."); *see also* Va. Code 18.2-18 ("an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree."). In fact, Cruse was permitted to plead guilty to first degree murder as a principal in the second degree in connection with Mr. Keller's murder on the basis of his testimony that he did not fire a fatal shot at Mr. Keller. See page 8, *supra*.

[30] Moreover, the impact of the Cruse report must be assessed in the context of the evidence that a deal existed between Cruse and the Commonwealth. *See Kyles*, 514 U.S. at 436 (when assessing materiality under *United States v. Bagley*, 473 U.S. 667 (1985), "suppressed evidence [must be] considered collectively, not item-by-item"). While the jury might have expected Williams to be motivated to save himself by blaming Cruse, had the jury known Cruse had an agreement with the prosecution, it would likely have seen this as an additional factor motivating Cruse to lie. This would have enhanced Williams' credibility relative to Cruse, increasing the likelihood of a different outcome at trial.

basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983). If Cruse's testimony had been discredited on the basis of the undisclosed psychiatric report, the jury's view of the "circumstances of the crime" would have been fundamentally altered: Cruse, not Williams, would have been identified as the person who fired all but one shot into the victims, and the person in all likelihood directly responsible for the deaths of both Mr. and Mrs. Keller. Giving Williams' culpability relative to Cruse in this scenario the individualized consideration required by the Eighth Amendment, it is at least reasonably probable that the jury would have returned a sentence less than death.

Williams was also prejudiced by the nondisclosure of Stinnett's relationships with Woodson and Meinhard. On *voir dire*, prospective jurors were asked whether they or any member of their immediate family had "ever been represented by" the attorneys involved in the trial, including Commonwealth Attorney Woodson. The prospective jurors were further asked if any of them were "related to" any of the individuals "who may be called as witnesses," including Deputy Sheriff Claude Meinhard. The trial court asked these questions for obvious reasons: an affirmative answer to either question would alert the court and counsel to a significant possibility of bias on the part of the prospective juror, since each question was addressed to the existence of a closer-than-arm's-length relationship between jurors and participants in the trial. *See generally* Rule 3A:14, Va. Rules of Court (enumerating questions to be asked by trial courts to identify potential bias or relations among veniremen and trial participants). As this Court has explained,

> One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.' . . . *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. . . . The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984), *quoting Smith v. Phillips*, 455 U.S. 209, 217 (1982).

Nevertheless, neither Stinnett nor Woodson responded to the court's questions, although Woodson had in fact represented Stinnett in her divorce, and although her ex-husband (and the father of her four children) was Meinhard. Their silence flouted Williams' right to be tried by an impartial jury. In *McDonough*, the Court held that "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. Here, no lawyer having the least experience with trials could doubt that Stinnett's and Woodson's failure to alert the trial court and counsel to Stinnett's relationships constituted a failure to answer a material question honestly.[31] And while Virginia law places the decision to grant or deny a challenge for cause at the discretion of the trial court, *Stockton v. Commonwealth*, 402 S.E.2d 196, 200 (Va. 1991), the record in this case

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[31] In April 1998, Stinnett and Woodson each made affidavits claiming that they were of the view that Stinnett was no longer "related" to Meinhard following the couple's divorce. Even if these conveniently concerted avowals were believed – as they should not be, since they have never been subjected to cross-examination, see note 16 *supra* – they are not dispositive. The questions put to Stinnett and Woodson made clear that they were seeking information bearing on potential bias, and neither Stinnett nor Woodson could plausibly have supposed that they – rather than the court – were to be the judges of their own bias. *See Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (the question whether to accept a "juror's protestation of impartiality" is for the trial court); *Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.").

indicates that the trial judge would have been inclined to uphold a challenge by defense counsel had the facts about Juror Stinnett been revealed. For example, another prospective juror, Brenda Harris, was successfully challenged for cause by Williams' counsel on the ground that she had worked as a correctional officer at a state prison seven years prior to the trial. Direct Appeal Record at 551. The court granted this challenge in spite of counsel's acknowledgment that Ms. Harris "certainly . . . rehabilitated herself well," after revealing her former employment as a correctional officer. Direct Appeal Record at 550. Given the trial court's finding of cause for the removal of Ms. Harris, whose connections to the Commonwealth's interests were substantially more attenuated than Stinnett's, it is far more likely than not that the trial court would likewise have found cause to remove Stinnett if her relations to Deputy Sheriff Meinhard and Commonwealth Attorney Woodson had been disclosed.

Additionally, even assuming that a challenge for cause based *solely* on truthful answers to the questions asked of Stinnett would not have been granted, additional *voir dire* following up on truthful answers "would have provided a valid basis for a challenge for cause," *McDonough*, *supra*. Such questioning would have revealed the full extent of Stinnett's relations with Meinhard and Woodson, and, if conducted with any skill, would have further exposed the partiality that motivated Stinnett to conceal those relations in order to maximize her chances of being seated.[32]

At a minimum, the indicia of Stinnett's partiality contained in the present record entitle Williams to a hearing at which he has "the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. at 215. Stinnett's relationships with Woodson and Meinhard, and her failure to reveal those relationships when asked directly on *voir dire*, suggest that she was

---

[32] *See, e.g., Dyer v. Calderon*, 151 F.3d 970, 982 (9th Cir. 1998) (*en banc*) ("The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent.")

not impartial. *See McDonough*, 464 U.S. at 556 (Blackmun, J., concurring) ("the honesty or dishonesty of a juror's response [on *voir dire*] is the best initial indicator of whether the juror in fact was impartial").[33]

In the end, Stinnett's and Woodson's failure to reveal Stinnett's true posture stripped Williams of his right to conduct meaningful, informative *voir dire*, through which he could have developed the record necessary to challenge Stinnett for cause. The hobbled *voir dire* not only prevented Williams from intelligently deciding whether to exercise a peremptory strike on Stinnett, *see Aldridge v. United States*, 283 U.S. 308, 314 (1931) (risk in denying adequate *voir dire* is "most grave when the issue is of life or death"), but deprived him of the opportunity to pursue further inquiry in order to prove that Stinnett harbored actual bias or persuade the trial court of the presence of implied bias. These deprivations undercut Williams' fundamental right to a "fair trial in a fair tribunal," *In Re Murchison*, 349 U.S. 133, 136 (1955), and thus worked to his " 'actual and substantial disadvantage.' " *Murray*, 477 U.S. at 494 (1986).

E. Guidance for the lower courts on remand

After Williams' right to a federal evidentiary hearing is recognized, this Court may wish to instruct the lower courts about the issues to be addressed at such a hearing. In this section, Williams outlines the evidentiary status of the four claims before the Court and identifies the areas where factual disputes exist.

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[33] Stinnett's circumstances could also support a finding of implied bias. As Justice O'Connor observed in her concurring opinion in *Smith*, "there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation . . . that the juror is a close relative of one of the participants in the trial. . . . Whether or not the state proceedings result in a finding of 'no bias,' the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances." *Smith*, 455 U.S. at 222.

To prevail on his two *Brady* claims, Williams must show three things: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 119 S.Ct. at 1948. Williams' first *Brady* claim centers on the psychiatric report indicating that Cruse "has little recollection of the event, other than vague memories, as he was intoxicated with alcohol and marijuana at the time." There is little need for additional evidentiary development on any aspect of this claim: the contents of the report are manifestly impeaching and favorable to the defense; the report was not turned over to defense counsel prior to trial; and the materiality of the report's contents may be determined on the basis of the existing record. In the event the Court is uncertain whether Williams has shown "cause" to overcome the procedural default of the claim, however, he should be entitled to develop and present facts corroborating his state habeas counsel's recollection that the psychiatric report was not in Cruse's court file when counsel reviewed it. *See Keeney*, 504 U.S. at 11 (remanding to allow the petitioner to "bring forward evidence establishing cause and prejudice").

Williams' second *Brady* claim, involving the Commonwealth's nondisclosure of a testimonial agreement with Cruse, does require additional factual development. As the district court noted, there is circumstantial evidence indicating that Cruse and the prosecution had some sort of formal or informal understanding that Cruse would escape the death penalty if he testified for the Commonwealth. *See* pages 14-15, *supra*. To prove that such a deal existed, however, Williams must be permitted to interview and present the testimony of witnesses, including Cruse and his attorneys, to review potentially relevant documents in the hands of the Commonwealth, and to cross-examine Cruse's attorney and the Commonwealth Attorneys concerning their affidavits.

Williams' claims involving Juror Stinnett likewise require an evidentiary hearing, at which he should be permitted to present the information now available to establish Stinnett's dishonesty in answering *voir dire* questions. He should also be allowed to develop additional evidence showing Stinnett's pattern of dishonesty on *voir dire* in order to demonstrate both that this pattern, if known to the trial court, would have resulted in Stinnett's discharge for cause, and that this pattern establishes her actual bias. *See Smith v. Phillips*, 455 U.S. at 222 ("the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias").

With regard to his claim centering on Commonwealth Attorney Woodson's failure to inform the trial court of Stinnett's connections to Meinhard and himself, Williams is entitled to develop and present evidence establishing the scope of Woodson's knowledge and the nature of his contacts with Stinnett and Meinhard. To this end, Williams should be permitted to review the prosecution's files concerning jury selection in this case for evidence of Woodson's motivations in failing to alert the trial court to Stinnett's circumstances. This information bears directly on Williams' contention that Woodson acted improperly by remaining silent when Stinnett misled the trial court, thereby violating Williams' rights to due process and a fair trial.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

*Barbara L. Hartung
1001 E. Main St., Suite 504
Richmond, VA 23219
(804) 649-1088

John H. Blume
Keir M. Weyble
1247 Sumter St., Suite 202
Columbia, SC 29201
(803) 765-1044

James E. Moore
Christian & Barton, L.L.P.
909 E. Main St., Suite 1200
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner
*Counsel of Record

December, 1999

APPENDIX A

The Virginia Code Annotated provides, in pertinent part:

Article 3.

Habeas Corpus.

§ 8.01-654. When and by whom writ granted; what petition to contain. – A. 1. The writ of habeas corpus ad subjiciendum shall be granted forthwith by the Supreme Court or any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

2. A petition for writ of habeas corpus ad subjiciendum, other than a petition challenging a criminal conviction or sentence, shall be brought within one year after the cause of action accrues. A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-654.1 for cases in which a death sentence has been imposed, shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of subsection C of this section and of § 17.1-310, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the

original judgment order of conviction or convictions complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be

deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.

C. 1. With respect to any such petition filed by a petitioner held under the sentence of death, and subject to the provisions of this subsection, the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus. The circuit court which entered the judgment order setting the sentence of death shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court.

2. Hearings conducted in a circuit court pursuant to an order issued under the provisions of subdivision 1 of this subsection shall be limited in subject matter to the issues enumerated in the order.

3. The circuit court shall conduct such a hearing within ninety days after the order of the Supreme Court has been received and shall report its findings of fact and recommend conclusions of law to the Supreme Court within sixty days after the conclusion of the hearing. Any objection to the report of the circuit court must be filed in the Supreme Court within thirty days after the report is filed. (Code 1950, § 8-596; 1958, c. 215; 1968, c. 487; 1977, c. 617; 1978, c. 124; 1995, c. 503; 1998, c. 577.)

* * *

ARTICLE 1.

Homicide.

§ 18.2-31. Capital murder defined; punishment. – The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery while armed with a deadly weapon;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape or forcible sodomy or attempted forcible sodomy;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9-169 (9) when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction; and

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair, or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, c. 636; 1983, c. 175; 1985, c. 428; 1988, c. 550; 1989, c. 527; 1990, c. 746; 1991, c. 232.)

* * *

ARTICLE 4.1.

Trial of Capital Cases.

§ 19.2-264.2. Conditions for imposition of death sentence. – In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless

the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

* * *

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(33)

Jan 31 2000

Supreme Court U.S.
FILED
JAN 31 2000
CLERK

No. 99-6615

In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF RESPONDENT

MARK L. EARLEY
Attorney General of Virginia

DONALD R. CURRY
Senior Assistant Attorney General
Counsel of Record
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4856
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. When it enacted 28 U.S.C. § 2254(e)(2) as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), did Congress intend a state prisoner's "due diligence" in pursuing a claim in state court to be the threshold inquiry for determining whether the statute even applies, or does the plain wording and structure of the statute evince Congress' intent that a federal habeas corpus court "shall not hold an evidentiary hearing . . . unless" the prisoner demonstrates both his "due diligence" in state court ***and*** "clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense"?

2. Did the Court of Appeals correctly conclude that the claims never raised by petitioner in state court are barred by his procedural default and that a federal evidentiary hearing on such claims is barred under § 2254(e)(2)?

3. Does this Court's granting of certiorari to determine the proper interpretation of § 2254(e)(2) implicate the Court of Appeals' judgment that the Virginia Supreme Court reasonably concluded that petitioner's "secret plea agreement" claim had "no merit" and that federal collateral relief is barred under § 2254(d)?

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STATEMENT OF THE CASE

A. Facts

Michael Williams was a quadruple murderer before he ever met Jeffrey Cruse. On Christmas Eve in 1992, using a .357 handgun belonging to one of his victims, Williams premeditatedly shot four men in the head inside a house in Prince Edward County, Virginia. He then set fire to the house and fled with the handgun. Two months later, Williams and Cruse, whom petitioner first met in January of 1993 (JA 222), murdered Mr. and Mrs. Morris Keller in adjacent Cumberland County.

On February 27, 1993, Williams and Cruse decided to commit a robbery at the Bear Creek Market, armed with the same .357 revolver Williams had stolen in Prince Edward. When they found the market closed, however, Williams suggested that they rob the Kellers who lived nearby.[1] The two then walked to the Keller residence where, after forcibly gaining entry, they stripped and bound the victims, searched their home for valuables and took possession of Mr. Keller's .38 pistol, raped Mrs. Keller, ordered both victims to shower and dress, and then marched the couple at gunpoint into the woods behind their home. (JA 80-99).

It is undisputed that at this point Williams was armed with the .38 pistol and Cruse with the .357 revolver. Cruse testified that Williams shot Mr. Keller in the head and then, at Williams' urging, Cruse shot Mrs. Keller in the head. Mr. Keller tried to stand and Williams shot him again. Then, after

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[1] Cruse recently had moved to Cumberland from Northern Virginia and did not know the Kellers. (JA 73-75, 78). Williams, on the other hand, was a life-long resident of Cumberland and "grew up . . . [r]ight down the road" from the victims. (JA 222, 226). While Cruse had no prior felony record (JA 139), Williams had two prior felony convictions (JA 237, 300-01) and only recently had been paroled. (Presentence report at 4B).

stating that he wanted to insure that the Kellers were dead, Williams fired multiple shots at both victims.[2] (JA 101-07).

Williams and Cruse gathered the victims' property, set the house afire, and fled in the victims' jeep. They later sold some of the stolen goods in Fredericksburg, where they burned the jeep and threw the .357 revolver into a river. They then returned to Cumberland, but Williams later fled to Florida. (JA 110-21).

Acting on a tip, the police contacted Cruse who denied any involvement and was released. But, after the victims' bodies were found behind their burned home, Cruse consulted counsel and negotiated a written agreement that would have spared him the death penalty in return for his truthful cooperation. (JA 133, 158, 162-63). Cruse told the authorities about the murders, but did not reveal that Mrs. Keller had been raped. When the rape later was discovered, the prosecutor revoked the agreement. (JA 151, 159). Cruse nevertheless cooperated with the police and helped them recover the victims' property and the .357 revolver. (JA 133). When Cruse testified against Williams, all the circumstances surrounding the breach of his agreement were disclosed to the jury. (JA 158-59).

Williams was the only defense witness. He admitted that he suggested the original robbery plan and that it was his idea to set fire to the Kellers' home. (JA 223-24, 234). However, he denied that he raped Mrs. Keller,[3] and claimed that the

[2] Mrs. Keller was shot once in the head with the .357 revolver and twice in the head with the .38 pistol. Mr. Keller was shot three times in the head and twice in the right leg, all with the .38 pistol. (JA 166-80).

[3] Williams said that he told Cruse that raping Mrs. Keller was "not a very good idea [because] DNA [testing] will pick it up." (JA 229).

only shot he fired was the first shot into Mr. Keller's head.[4] (JA 229-30, 232-33).

Seminal fluid found on the vaginal swab obtained from Mrs. Keller's body contained a particular subtype of enzyme that, of the relevant parties, only Williams possessed.[5] A DNA test of the spermatozoa found on the vaginal swab was consistent with the conclusion that both Williams and Cruse had raped Mrs. Keller. (JA 202-06).

B. Trial Proceedings

On January 6, 1994, a jury convicted Williams of burglary, rape, arson, two counts of robbery, two counts of abduction, and multiple counts of capital murder. The jury fixed Williams' punishment at 20 years for the burglary, life

[4] Williams admitted that, when he and Cruse marched the Kellers into the woods behind their home, he was armed with the .38 pistol and Cruse was armed with the .357 Black Hawk revolver. (JA 232, 245). Williams also admitted that he fired the first shot into Mr. Keller's head with the .38 and that Cruse then shot Mrs. Keller in the head with the .357 Black Hawk. (JA 232-33, 245). Given those undisputed facts, Williams was able to place the .38 pistol in Cruse's hand thereafter only by the implausible explanation that, immediately after Cruse shot Mrs. Keller, Williams turned to Cruse and said, "Let me get my gun back." (JA 245). According to Williams, as soon as Cruse "pulled" the .38 pistol from Williams' hand, Cruse began firing the .38 at the Kellers. (JA 233). But, when Williams was arrested on March 4, 1993, his statement to the police was ***not*** that Cruse had fired a first shot with the .357 revolver and then fired all the remaining shots with the .38 pistol. To the contrary, when informed that the .357 handgun had been recovered and that Cruse had told the police "the whole story," Williams stated, "I can prove that [Cruse] had that goddamn Black Hawk." (JA 215-19). In other words, while Williams correctly placed responsibility on Cruse for shooting Mrs. Keller with the .357 revolver, he gave no indication that Cruse ever had fired the .38 pistol.

[5] The forensic analysis detected the presence of "PGM subtype 2-" on Mrs. Keller's vaginal swab. (JA 195). Of Williams, Cruse and Mr. and Mrs. Keller, only petitioner possessed the "PGM subtype 2-" enzyme. (JA 193-96). Thus, Williams' assertion that the forensic evidence was "inconclusive" is simply false. (Pet. Br. 6 n.6).

imprisonment for the rape, 50 years for the arson, 40 years for each of the robberies, and 10 years for each of the abductions. The jury sentenced Williams to death for the capital murders of Mr. and Mrs. Keller, finding in both instances that Williams represented a continuing serious threat to society ***and*** that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. *See* Va. Code § 19.2-264.4. On February 22, 1994, the trial court imposed both death sentences.

C. Direct Appeal

Williams' convictions and sentences were affirmed by the Supreme Court of Virginia on November 4, 1994. With respect to Williams' death sentences, the state court expressly relied on the four Prince Edward murders which Williams had committed prior to the capital murders.[6] *Williams v. Commonwealth*, 450 S.E.2d 365, 377, 379 (Va. 1994). This Court denied certiorari on June 26, 1995. *Williams v. Virginia*, 515 U.S. 1161 (1995).

D. State Habeas Corpus

On August 10, 1995, the trial court appointed an attorney to represent Williams in his state habeas proceedings. On January 29, 1996, Williams filed an amended habeas petition. Of his present claims, only one was raised in any form – his allegation that the prosecution failed to disclose that, at the time of trial, Cruse supposedly still had an agreement with the prosecution that he would not receive a death sentence. (JA

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[6] Williams admitted the Prince Edward murders to both the judge and his trial counsel. (JA 336-39, 434). He subsequently pleaded guilty to capital murder and three counts of first-degree murder and was sentenced to four terms of life imprisonment plus fourteen years. He murdered Jeffrey Villalobos by inflicting a "contact" gunshot wound to the back of the head. (JA 320-21). Williams shot William Cutter and George Atkinson, Sr., once each in the face. (JA 322, 326). He executed George Atkinson, Jr. with two close-range shots to the face. (JA 328-29).

384-88). Prior to filing his amended petition, Williams had filed conclusory motions for the appointment of an investigator and for discovery. (JA 355-60, 371-72). The respondent opposed Williams' motions (JA 364-68, 373-75), and answered the "secret agreement" claim ***with affidavits from both the trial prosecutor and Cruse's trial attorney, unequivocally stating that Cruse had testified truthfully at trial that he had no agreement with the prosecution***. (JA 440-42).

The Virginia Supreme Court dismissed Williams' petition on March 18, 1996, expressly finding that the "secret agreement" claim had "no merit." (JA 444-45). The state court also denied Williams' motions for an investigator and discovery. (JA 444). Certiorari again was denied by this Court. *Williams v. Netherland*, 519 U.S. 877 (1996).

E. Federal Habeas Corpus

Williams filed his federal petition on November 21, 1996, approximately seven months after the effective date of AEDPA. (JA 458-82). He raised not only his claim regarding Cruse's supposedly undisclosed agreement (JA 470-74), but also for the first time two claims related to Juror Bonnie Stinnett's allegedly untruthful responses during voir dire (JA 459-65, 475-77) and a claim that the prosecution failed to disclose a psychiatric report concerning Cruse. (JA 474-75). On December 20, 1996, the Warden moved to dismiss, asserting among other things that AEDPA applied to Williams' case and that an evidentiary hearing was barred under 28 U.S.C. § 2254(e)(2).

Williams filed no discovery request until April 29, 1997, when he asked the district court to issue subpoenas for documents pertaining to Cruse from a wide variety of sources, including Cruse's trial attorneys. (JA 505-13). On July 16, 1997, the district court denied Williams' request, specifically finding that he had failed to establish "good cause" as required by Rule 6(a), Rules Governing Section 2254 Cases. (JA 520). On April 13, 1998, the district court dismissed all of Williams' claims except those involving Juror Stinnett and Cruse's allegedly undisclosed agreement. (JA 529). The court

found that the claim involving Cruse's psychiatric report was defaulted and did not warrant a hearing. (JA 559-61).

On April 20, 1998, the Warden filed a motion for summary judgment, reasserting that an evidentiary hearing was barred under § 2254(e)(2). On May 15, 1998, the district court declined to rule on the Warden's motion and scheduled an evidentiary hearing. (JA 633-34). The Warden then asked the United States Court of Appeals for the Fourth Circuit to require the lower court to determine whether an evidentiary hearing on Williams' particular claims was permissible under § 2254(e)(2). On May 27, 1998, the Fourth Circuit stayed the district court's order awarding an evidentiary hearing and directed the lower court to apply § 2254(e)(2) to Williams' claims. (JA 635-37). On remand, the district court applied § 2254(e)(2), determined that a hearing was prohibited and dismissed the petition in its entirety. *Williams v. Netherland*, 6 F. Supp. 2d 545 (E.D. Va. 1998). (JA 638-46).

On August 2, 1999, the Fourth Circuit affirmed the district court's denial of relief. *Williams v. Taylor*, 189 F.3d 421 (4th Cir. 1999). (JA 651-71). The Court of Appeals applied § 2254(e)(2) to Williams' claims that never had been raised in state court, but also determined that he was not entitled to an evidentiary hearing even under pre-AEDPA law. (JA 656-63). The Fourth Circuit did ***not*** apply § 2254(e)(2) to Williams' claim regarding Cruse's alleged "secret agreement," but determined that he was not entitled to an evidentiary hearing under pre-AEDPA law. (JA 664-66). On October 28, 1999, this Court granted certiorari, limited to petitioner's challenge to the applicability of § 2254(e)(2) to his claims. *Williams v. Taylor*, 120 S.Ct. 395 (1999).

SUMMARY OF ARGUMENT

This is a case, not about another judicial fine-tuning of a federal habeas court's equitable discretion, but about interpreting an act of Congress expressing its judgment as to how the interests of comity, finality and federalism are to be accommodated within a specific aspect of federal collateral review. Of all the aspects of such review that adversely affect

those interests, the most intrusive and damaging ***by far*** is an evidentiary hearing, presided over by a lone federal judge with virtually unbounded authority to redetermine the facts that will govern a state prisoner's attack upon his criminal conviction that already has survived direct appeal and state collateral review.

It would be difficult to imagine an act that exerts more strain on our federal system than a United States judge purporting to redetermine the facts that were before the state court when it rejected a prisoner's claim or passing judgment upon facts that never were presented to the state court. Indeed, the evidentiary hearing Williams is seeking would require not only the testimony of one of the jurors who decided his case, but also the testimony of the prosecutor, ***who is now a sitting Virginia judge*** and who already has stated unequivocally in an affidavit that Williams' allegations are baseless. (JA 440-41, 629-30). The spectacle of a federal judge deciding whether a state judge is telling the truth only would exacerbate the strain.

Section 2254(e)(2) is an integral part of AEDPA's federal habeas reform. It mandates that a federal court "shall not" conduct an evidentiary hearing "unless" the applicant demonstrates two things: that the failure to develop the facts in state court is not attributable to him, *see* § 2254(e)(2)(A)(i) and (ii); ***and*** that there is "clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." *See* § 2254(e)(2)(B). (Resp. App. 4-5). The governing standard thus has evolved from "deliberate bypass," *see Townsend v. Sain*, 372 U.S. 293 (1963), to "cause and prejudice, or actual innocence," *see Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) – both of which were established by this Court as limits upon a district court's ***discretion*** – to a legislatively-imposed standard of "due diligence and actual innocence," couched in terms which clearly limit a district court's ***power*** to conduct a hearing. Because it is Congress, not this Court, that determines the jurisdiction of the lower federal courts, this Court must follow Congress' unequivocal command.

Williams' argument – that his alleged "due diligence" in state court renders § 2254(e)(2) entirely inapplicable – has no merit. The statute's internal structure necessarily contemplates that evidentiary hearings will be prohibited even where it is undisputed that the prisoner used "due diligence" in state court. Thus, the statute's introductory phrase – "If the applicant has failed to develop the factual basis of a claim in State court proceedings . . . " – must be given its logical meaning. In this context, the concept of "failure" simply has nothing to do with "due diligence" or fault. It merely describes the posture of the prisoner's case at the conclusion of the state court proceedings: regardless of whether he attempted to develop the facts, he nevertheless failed to do so.

Section 2254(e)(2) applies to defaulted claims that never were raised in state court. *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam). The Fourth Circuit thus properly applied § 2254(e)(2) to Williams' claims involving Juror Stinnett and Cruse's psychiatric report, none of which ever was raised in state court. The Court of Appeals also correctly concluded that there is no "cause" for Williams' defaults. The factual predicate for the juror claims has been a matter of public record since well before the time of trial. And, the factual predicate for the claim involving the psychiatric report certainly was available at the time of Williams' state collateral proceedings. Thus, as the Fourth Circuit found, Williams was not entitled to a hearing on these claims even under the pre-AEDPA, "cause and prejudice" standard.

The Fourth Circuit did not apply § 2254(e)(2) to Williams' claim concerning Cruse's alleged "secret agreement." This Court's ultimate interpretation of the statute, therefore, will not implicate the validity of the Court of Appeals' judgment. Nonetheless, § 2254(e)(2) clearly is applicable to the claim and, in conjunction with §§ 2254(d) and 2254(e)(1), precludes an evidentiary hearing to expand the factual record beyond what was before the state court when it reasonably rejected the claim on the basis of, among other things, Cruse's sworn trial testimony and the unrebutted affidavits of both the prosecutor and Cruse's trial attorney. Neither in state nor

federal court has Williams proffered ***any*** evidence that supports his claim. He merely wants an evidentiary hearing so that a single federal judge can redetermine the credibility or weight of the evidence upon which the state supreme court relied when it rejected his claim, or so that he somehow might discover facts which he hopes will support his claim. Neither post nor pre-AEDPA law entitles a state prisoner to an evidentiary hearing under these circumstances.

ARGUMENT

Under the plain language of § 2254(e)(2), "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the [district] court ***shall not*** hold an evidentiary hearing on the claim ***unless*** the applicant shows" two things. (Emphasis added). First, he must show that his claim relies either upon "a new rule of constitutional law" that this Court already has declared "retroactive to cases on collateral review" or upon "a factual predicate that could not have been previously discovered through the exercise of due diligence." *See* § 2254(e)(2)(A)(i) and (ii).[7] Second, even if the applicant satisfies one of the two foregoing requirements, he also must demonstrate that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *See* § 2254(e)(2)(B). (Resp. App. 4-5).

Williams expressly admits that, if the statute is applicable to his claims, an evidentiary hearing is barred ***because he cannot satisfy the "clear and convincing evidence" requirement of § 2254(e)(2)(B)***. (Pet. Br. 25). Indeed, both the district court (JA 644-45) and the Fourth Circuit readily concluded that, in view of Williams' testimony admitting that he shot Mr. Keller in the head during the robbery and after Mrs. Keller had been raped, it would be impossible to conclude that the facts underlying Williams' claims "establish by

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[7] The "new rule" aspect of § 2254(e)(2) is not implicated by any of Williams' claims.

clear and convincing evidence that . . . no reasonable fact-finder would have found [him] guilty of [capital murder]."[8] (JA 660-61).

Thus, the threshold issue is whether § 2254(e)(2) is applicable to Williams' claims. If it is, an evidentiary hearing is barred and the case is over. If it is not, this Court then must review the Fourth Circuit's conclusion that Williams is not entitled to an evidentiary hearing even under pre-AEDPA law.

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[8] Williams admitted that he was a full participant in the armed robbery, an accomplice to the rape of Mrs. Keller, and that he fired the first shot into Mr. Keller's head. (JA 225-32, 243-45; Pet. Br. 42 n.27). Contrary to Williams' assertion, the medical examiner did ***not*** testify that the first gunshot wound inflicted upon Mr. Keller "was not likely fatal in and of itself." (Pet. Br. 6). The unrefuted medical evidence proved that all three of the gunshot wounds to Mr. Keller's head contributed to his death. (JA 178-81, 185-36). Indeed, the district court expressly found that, "[a]ccording to the medical evidence . . . , any of the three gunshot wounds to Mr. Keller's head could have been potentially lethal ***and all three definitely contributed to his death***." (JA 645, emphasis added). Thus, Williams' admission that he fired the first bullet into Mr. Keller's head clearly satisfied the requirements of Virginia law regarding proof that the defendant "was an active and immediate participant in the acts or acts that caused the victim's death." *See Strickler v. Greene*, 119 S.Ct. 1936, 1953 n.39 (1999). When this admission is combined with the concession that the killings occurred during the course of the armed robbery and subsequent to the rape, any notion of "clear and convincing evidence" that Williams is not guilty of the capital murder of Mr. Keller becomes a legal impossibility. *See Briley v. Commonwealth*, 273 S.E.2d 57, 63 (Va. 1980) ("It is only necessary to prove that the defendant was the triggerman in the murder and an accomplice in the robbery or rape to convict him of capital murder"). ***Indeed, as Williams acknowledged in state court, when he testified he "essentially had to admit to capital murder by inflicting a potentially lethal wound in the commission of robbery."*** (CA4 JA 1027). Williams' reliance on *Cheng v. Commonwealth*, 393 S.E.2d 599 (Va. 1990), is misplaced. (Pet. Br. 41). In *Cheng*, the victim was shot four times, all with the same weapon, and the issue was whether the defendant was the person who fired those shots. *See Cheng*, 393 S.E.2d at 602, 607-08. Here, the jury was instructed correctly that Williams could be convicted of capital murder pursuant to Virginia's "joint participation" rule. (JA 260, 293).

As will be demonstrated, however, the threshold question must be answered in the affirmative.

I. BY ENACTING § 2254(e)(2), CONGRESS LIMITED A FEDERAL HABEAS COURT'S JURISDICTION TO CONDUCT AN EVIDENTIARY HEARING TO THE RARE CASE WHERE THE PETITIONER'S CLAIM SATISFIES TWO STRINGENT REQUIREMENTS.

Congress enacted § 2254(e)(2) as an integral part of AEDPA's comprehensive federal habeas reform. No one could argue seriously that the intent of AEDPA was to expand the scope or availability of the writ. *See* House Conf. Report No. 104-518 (Apr. 15, 1996) at p. 111: *Joint Explanatory Statement of the Committee of Conference* ("This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases"); *see also Hohn v. United States*, 524 U.S. 236, 264-65 (1998) (Scalia, J., joined by Rehnquist, C.J., O'Connor and Thomas, JJ., dissenting) ("The purpose of AEDPA is not obscure. It was to eliminate the interminable delays in the execution of state and federal criminal sentences, and the shameful overloading of our federal criminal system, produced by various aspects of this Court's habeas corpus jurisprudence"). And, Congress' specific intent in enacting § 2254(e)(2) is evident, not only from the plain language it employed, but also from the statute's place in the evolution of modern federal habeas law. Over the last four decades, that law has progressed from a liberal "deliberate by-pass" standard, to a more moderate "cause and prejudice" standard, and now to a legislatively-imposed "due diligence and innocence" standard. This new standard not only sharply limits the availability of evidentiary hearings, but for the first time expressly conditions a district court's authority to hold such hearings upon a determination that the particular claim at issue satisfies both of two very demanding requirements.

A. Townsend v. Sain

In 1963, this Court ruled: "Where the facts are in dispute, the federal court in habeas corpus ***must*** hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court. . . . In other words a federal evidentiary hearing ***is required*** unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend v. Sain*, 372 U.S. at 312-13 (emphasis added). The Court then set forth six particular circumstances when a federal habeas court "must grant an evidentiary hearing," the fifth of which was when "the material facts were not adequately developed at the state-court hearing." *Id.* at 313.

Borrowing from *Fay v. Noia*, 372 U.S. 391 (1963), *Townsend* explained that the prisoner could be disentitled to a hearing based upon a failure to develop the material facts only if he "deliberately by-passed" an opportunity to present the facts in state court. *See Townsend*, 372 U.S. at 317. Even then, the Court made clear that a federal court retained the authority to conduct a hearing and that the prisoner's "deliberate by-pass" merely took his case from the realm where a hearing was required to where it was discretionary. *Id.* at 318.

In other words, if the district court ***denied*** a hearing, the prisoner might be able to challenge that ruling successfully on appeal but, if the court ***granted*** a hearing, there was absolutely nothing the State could do. It should not be surprising that a system so weighted in favor of prisoners and against the States could not survive if the interests of comity, finality and federalism were ever given their due. Fortunately, over the next several decades, those interests gradually moved to the forefront.

B. The 1966 Amendments

In 1966, Congress enacted 28 U.S.C. § 2254(d), which created a presumption of correctness regarding state court findings of fact, subject to eight enumerated exceptions, many of which were borrowed directly from *Townsend*. Act of Nov. 2, 1966, Pub. L. 89-711, 80 Stat. 1105. This Court has been of two minds as to whether the 1966 amendments "codified"

Townsend or even addressed the issue of whether a hearing is required. *Compare Thompson v. Keohane*, 516 U.S. 99, 109 (1995) (characterizing § 2254(d) as "an almost verbatim codification of the standards delineated in *Townsend* . . . for determining when a district court must hold an evidentiary hearing") *with Tamayo-Reyes*, 504 U.S. at 10 n.5 (while § 2254(d) "list[ed] exceptions to the normal presumption of correctness of state-court findings and deal[t] with the burden of proof where hearings are held," it did "not codify *Townsend*'s specifications of when a hearing is required," or "purport to govern the question of when hearings are required").

The Court clearly has held, however, that the 1966 amendments "elevated" *Townsend*'s "exhortation" that a federal court "ordinarily should . . . accept the facts as found" by the state courts, *see Townsend*, 372 U.S. at 318, "into a mandatory presumption of correctness." *Miller v. Fenton*, 474 U.S. 104, 111 (1985). The Court also has concluded that the amendments "were intended by Congress as limitations on the exercise of . . . jurisdiction." *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981). And, most significantly, the Court has acknowledged that "[f]ederal habeas has been a source of friction between state and federal courts, . . . [that] Congress obviously meant to alleviate some of that friction when it enacted subsection (d) in 1966. . . . [and that] ***some content must be given to the provisions of the subsection if the will of Congress be not frustrated***." *Id.* at 550 (emphasis added).

C. Keeney v. Tamayo-Reyes

This Court did not revisit the availability of evidentiary hearings for nearly thirty years after *Townsend*. By that time, however, the Court already had restricted substantially the scope of habeas review in terms of whether the prisoner's ***claim*** was properly before the court. For example, claims defaulted in state court pursuant to an adequate and independent state procedural ground were barred from federal review, absent a finding of both "cause and prejudice," *see Wainwright v. Sykes*, 433 U.S. 72 (1977), or a showing of "actual innocence." *See Murray v. Carrier*, 477 U.S. 478 (1986). This

procedural default doctrine applied regardless of whether the claim was defaulted at trial, on direct appeal, or on state collateral review. *See Coleman v. Thompson*, 501 U.S. 722 (1991). Similarly, claims that could have been raised in a prior federal petition were barred, subject to the same "cause and prejudice or actual innocence" standard. *See McCleskey v. Zant*, 499 U.S. 467 (1991). And, claims which sought either to announce or apply a "new rule" of constitutional law were barred, subject to two very narrow exceptions. *See Teague v. Lane*, 489 U.S. 288 (1989).

All of these limits on the availability of the writ were animated by the interests of comity, finality and federalism, and a recognition of the substantial costs exacted by federal collateral review. *See Coleman*, 501 U.S. at 745-51; *McCleskey*, 499 U.S. at 489-93; *Teague*, 489 U.S. at 308-10. In 1992, this Court determined that these same interests required a similar restriction on the availability of hearings to develop facts that were not developed in state court. *Tamayo-Reyes*, 504 U.S. at 5-8. The Court then expressly overruled *Fay* and *Townsend*'s "deliberate by-pass" standard, and established for defaulted facts the very same "cause and prejudice or actual innocence" standard that applies to defaulted claims. *Id.* at 8.

None of this Court's limits on the scope of the writ, however, purported to revoke or lessen a federal court's ***power*** to grant relief or to conduct an evidentiary hearing. Instead, the Court merely defined particular circumstances where "considerations of comity and concerns for the orderly administration of criminal justice . . . require a federal court to forego the exercise of its . . . power." *See Tamayo-Reyes*, 501 U.S. at 6; *see also Carrier*, 477 U.S. at 514 n.2 The Court's solicitude for a district court's raw power was a recognition of the fundamental fact that it is Congress, not this Court, that defines the lower federal courts' jurisdiction. *See* U.S. Const. Art. III; *Keene Corporation v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts . . . and, once the lines are drawn, 'limits upon federal jurisdiction . . . must be neither disregarded nor evaded' ")

(citation omitted). In 1996, however, Congress dramatically altered the jurisdictional calculus.[9]

D. AEDPA's § 2254(e)(2)

When Congress enacted AEDPA, it not only expressly addressed for the first time the availability of evidentiary hearings for state prisoners, but repealed the former § 2254(d) which had been enacted in response to *Townsend*, replaced it with a more stringent presumption of correctness,[10] ***and expressly forbade district courts from conducting such hearings unless the prisoner satisfies two demanding requirements***. "[I]t is the duty of this [Court] to see to it that the jurisdiction of the [district courts], which is defined and limited by statute, is not exceeded." *Mata*, 449 U.S. at 547 n.2 (citation omitted); *see also Arkansas v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826 (1997) (tax statute stating that "[t]he district courts shall not enjoin . . . " is "first and

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[9] Despite *Tamayo-Reyes*'s limits on the discretion to conduct evidentiary hearings, the result nevertheless was unsatisfactory to the States because, if a district court erroneously concluded that the "cause and prejudice" standard had been satisfied and conducted an evidentiary hearing, there remained nothing the States could do. And, once the facts were heard and determined by the district judge, States were faced on appeal with the futile task of attempting to "unring the bell," arguing that the court of appeals should ignore any adverse facts found by the district court because the court should not have conducted a hearing in the first place.

[10] AEDPA replaced § 2254(d) with § 2254(e)(1) which mandates that state court factual determinations "shall be presumed to be correct" and that the prisoner "shall have the burden of rebutting the presumption by clear and convincing evidence." (Resp. App. 4). ***The eight former exceptions to the presumption of correctness were deleted.*** Thus, regardless of whether the 1966 amendments were intended to codify or modify *Townsend*, or the extent to which *Townsend* survived *Tamayo-Reyes*, AEDPA's §§ 2254(e)(1) and (e)(2), in combination, clearly intended to eliminate any vestige of *Townsend* regarding the availability of evidentiary hearings.

foremost a vehicle to limit drastically federal district court jurisdiction . . . ").[11]

Williams contends, however, that § 2254(e)(2) does not even apply unless "the applicant has failed to develop the factual basis of a claim in State court proceedings." According to petitioner, an applicant cannot be deemed to have "failed to develop" his claim if he demonstrates his "due diligence" in pursuing the claim in state court. (Pet. Br. 21-23). This argument, however, ignores the plain wording and intent of the statute.[12] *See generally Holloway v. United*

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[11] As will be demonstrated (see Argument II), § 2254(e)(2) clearly applies to a claim that is not even properly before the federal court because it never was raised in state court. But, as to claims which were rejected on the merits in state court, AEDPA erected parallel general prohibitions against the granting of relief and the conducting of a hearing to expand the factual basis for the claim beyond what the prisoner presented to the state court. (See Argument III). In both instances, Congress declared that a federal court "shall not" take a specified action "unless" certain stringent requirements are satisfied. *See* § 2254(d) ("An application . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless . . . "); § 2254(e)(2) ("the court shall not hold an evidentiary hearing on the claim unless . . . "). (Resp. App. 3-4). AEDPA also erected a similar general prohibition against granting relief upon claims raised in a second federal petition. *See* § 2244(b)(2) ("A claim . . . that was not presented in a prior application shall be dismissed unless . . . "). And, in this context, as in the context of evidentiary hearings, "due diligence" must be linked to "clear and convincing evidence" of innocence before the general prohibition can be surmounted. *See* § 2244(b)(2)(B)(i)-(ii). (Resp. App. 1). This internally consistent structure clearly evidences Congress' intent to make both the granting of relief and the holding of a hearing the rare exception rather than the norm.

[12] The President also expressed the mistaken view that the statute "is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court." Statement Accompanying Signing of Pub. L. 104-132, 32 Weekly Comp. Pres. Doc. 719 (Apr. 24, 1996). Such a "signing statement" should not be afforded any deference in determining Congress' intent. *See generally* Popkin, Judicial Use of Presidential Legislative History: A Critique, 66 Ind. L. J. 699, 700 (1991) ("judicial reliance on presidential signing statements has almost nothing to recommend it. . . . the President is not a legislator and . . . signing statements . . . are often politically manipulative attempts to undermine statutory structure or achieve results too controversial to be adopted in the text").

States, 119 S.Ct. 966, 969 (1999) ("the language of the statutes that Congress enacts provides 'the most reliable evidence of its intent' ").

Congress clearly did not intend for the prisoner's alleged "due diligence" in state court to be the trump card Williams envisions. As written, the statute obviously contemplates that there will be claims as to which the prisoner will satisfy § 2254(e)(2)(A)(ii)'s "due diligence" requirement, ***but which nevertheless cannot be the subject of a hearing because, as here, the prisoner cannot satisfy the "innocence" requirement of § 2254(e)(2)(B)***.[13] *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (noting "AEDPA's central concern that the merits of concluded criminal proceedings not be revisited ***in the absence of a strong showing of actual innocence***") (emphasis added). Williams, however, would have this Court reach the nonsensical conclusion that, even though the statute expressly requires a showing of both "due diligence" ***and*** "clear and convincing evidence" of innocence, Congress nevertheless intended that a showing of "due diligence" by itself is sufficient to render the statute's general ban on hearings entirely inapplicable.[14]

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[13] In this Court's post-*Sykes* jurisprudence, "due diligence" as "cause" never has been sufficient to excuse a prisoner's default; a petitioner had to demonstrate both "cause" ***and*** "prejudice" or "actual innocence." By enacting § 2254(e)(2), Congress exercised its prerogative and narrowed the scope of the writ even further by requiring a showing of both "cause" in the form of "due diligence" ***and*** "clear and convincing evidence" of innocence. Congress certainly did not intend, as Williams suggests, to retreat by authorizing hearings merely upon a showing of "cause."

[14] The ACLU's amicus brief acknowledges that Williams' use of the term "diligence" to describe the threshold inquiry under the statute is "confusing." (ACLU Br. 11). The ACLU, however, then adopts the very same confusing interpretation by contending that subsection (A)(ii)'s "due

The conjunctive nature of § 2254(e)(2)'s requirements compels the conclusion that the statute's introductory phrase, "If the applicant has failed to develop . . . ," must mean something different from the "due diligence" requirement embodied in § 2254(e)(2)(A)(ii). *See Hohn*, 524 U.S. at 249 ("We are reluctant to adopt a construction making another statutory provision superfluous"). Williams contends, in effect, that a habeas petitioner cannot "fail to develop" his claim in state court if he made any attempt – no matter how perfunctory – to do so. According to Williams, the mere fact that he asked for an evidentiary hearing and filed requests for discovery and investigative assistance – ***actions now taken as a matter of course by virtually every capital habeas petitioner*** – precludes a finding that he failed to develop the factual basis for his claim in state court. (Pet. Br. 29-33). This argument, if accepted, would render the statute a practical nullity.[15]

Section 2254(e)(2)'s prefatory "failed to develop" language has nothing to do with the prisoner's "due diligence,"

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diligence" requirement "come[s] into play only if a federal court first determines that it was the prisoner's fault . . . that the facts were not developed earlier." (ACLU Br. 11 n.14). The ACLU does not even attempt to explain how Congress logically could have intended to establish "due diligence" as one of two requirements that a state prisoner must satisfy if, as amicus contends, a federal court necessarily will have determined that the prisoner is at fault, *i.e.*, that he was not "diligent," before those requirements even come into play.

[15] As the Fourth Circuit noted, Congress certainly did not intend for state prisoners to be able "to avoid the strictures of section 2254(e)(2) simply by churning out unsupported, boilerplate requests for state court discovery, hearings, and investigative and expert assistance." (JA 659). ***This Court should have no doubt that accepting Williams' interpretation of the statute would insure that such boilerplate motions would be filed in every capital case, thus rendering the statute a dead letter in that context.*** Indeed, the amicus brief filed by the ACLU admits as much. (ACLU Br. 11 n.14). If, in order to avoid the statute entirely, all a prisoner must do is ask the state court for a hearing, discovery or investigative assistance, the statute is truly worthless.

or lack thereof, in pursuing the claim in state court. In common parlance, one certainly may attempt to accomplish a task but nevertheless "fail" to do so. *See* Webster's Third New International Dictionary 814 (1993) (def. 2b: defining the verb "fail" as "to miss success in some effort: become forced to leave incomplete an attempt or enterprise"); *id.* at 815 (def. 2: defining "failure" as "want of success"). Given the internal structure of § 2254(e)(2), Congress' use of the phrase, "failed to develop," must be given its logical, neutral meaning: the prisoner either developed the predicate facts for his claim in state court or he "failed" to do so and the statute applies; and, if the statute applies, there can be no hearing unless the prisoner satisfies both of the statute's twin requirements, ***one of which specifically takes into account whether the petitioner is at fault for the failure to develop the facts in state court.***[16]

Williams relies upon a number of court of appeals decisions which have rejected the Warden's interpretation of § 2254(e)(2) because such an interpretation allegedly allows state courts to "manipulate" the system and "insulate" their criminal judgments from federal hearings merely by refusing to grant state prisoners' requests for hearings, discovery and investigative assistance. (Pet. Br. 26-27 n.19).[17] Such a

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[16] Both Williams and the ACLU characterize the Warden's position as one that places "strict liability" upon habeas petitioners. (Pet. Br. 35; ACLU Br. 14-15). It would be a strange species of "strict" liability, however, that expressly allows for an exception if the petitioner makes the required showing of "due diligence" and "innocence." Williams' real complaint is that his claims do not fit within the narrow exception created by Congress. Indeed, the unspoken formula of Williams' brief is to work backwards from the acknowledged fact that he cannot show clear and convincing evidence of his innocence to a conclusion that Congress could not have intended to establish such a showing of innocence as a prerequisite for a hearing.

[17] *See, e.g., Burris v. Parke*, 116 F.3d 256, 269 (7th Cir.), *cert. denied*, 522 U.S. 990 (1997). Neither *Burris* nor any other case petitioner relies upon comes to grips with the inherent illogic of making the prisoner's "due diligence" a threshold inquiry which may render the statute wholly

hostile view of the States, however, is fundamentally at odds with this Court's expressed view. *See Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993) ("state courts are fully qualified to identify constitutional error . . . , and . . . often occupy a superior vantage point"); *Sawyer v. Smith*, 497 U.S. 227, 241 (1990) ("State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution"). More importantly, there is no evidence that when it enacted AEDPA Congress viewed the state judiciaries with such a jaundiced eye. *See* 141 Cong. Rec. S 7846 (Sen. Hatch expressing view that state courts are just as capable as federal courts). Like all federal courts, state courts undoubtedly are imperfect on occasion, but there is no basis for a conclusion that, if this Court were to interpret § 2254(e)(2) in the manner Congress intended and the Warden advocates, the state courts would seize upon that interpretation as an opportunity to act in bad faith. Our system of federalism simply cannot survive such unfounded suppositions. *See Withrow v. Williams*, 504 U.S. 680, 723 (1993) (Scalia, J., concurring and dissenting) ("It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not)").[18]

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inapplicable when Congress clearly has stated that such "due diligence" has force only when linked with a compelling showing of innocence.

[18] The Virginia College of Criminal Defense Attorneys (VCCDA) complains that, since 1995 when the Virginia Supreme Court was given exclusive jurisdiction over habeas petitions filed by death row prisoners, it has not granted any requests for an evidentiary hearing or any motion for discovery or investigative assistance. The complaint is meaningless. Compared to many States, Virginia has relatively few capital cases, presently only 25, and the VCCDA's argument is based on a sample of only 31 cases. (VCCDA Br. 5). The amicus, moreover, cannot point to even a single post-1995 case where the state court denied a request for an evidentiary hearing but a federal court subsequently conducted a hearing on the same claim, let alone demonstrate that the state court's denial of a hearing was objectively unreasonable given the nature of the request upon

II. SECTION 2254(e)(2) CLEARLY BARS AN EVIDENTIARY HEARING ON THE DEFAULTED CLAIMS THAT WILLIAMS NEVER RAISED IN STATE COURT.

It is beyond question that, if a prisoner failed to raise a claim in state court, he necessarily "failed to develop the factual basis of [the] claim in state court proceedings" within the meaning of § 2254(e)(2). If the claim itself is not properly before the federal court, the facts underlying such a claim cannot be the subject of a hearing. *See Tamayo-Reyes*, 504 U.S. at 8 n.3 (noting the dissent's agreement that "the cause-and-prejudice standard is . . . an acceptable precondition to reaching the merits of a habeas petitioner's [defaulted] claim"); *id.* at 14 (O'Connor, J., dissenting) ("To be sure, habeas corpus has its own peculiar set of hurdles a petitioner must clear before his claim is properly presented to the district court").

That is not to say, however, that § 2254(e)(2) has no application to defaulted claims never raised in state court. Indeed, this Court already has made clear that, while the statute's role in this context is secondary, it is nevertheless both significant and preclusive.

Two years after AEDPA became effective, this Court held in *Breard v. Greene*:

> It is the rule in this country that assertions of error in criminal proceedings must first be raised in state

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which it acted. The same is true of the amicus' assertion regarding state court denials of requests for discovery and investigative assistance. Unless specific examples of motions that the state court supposedly should have granted are brought to this Court's attention, the complaint is about as cogent as a gripe that this Court never has granted an original jurisdiction habeas petition filed by a death row prisoner. Absent a persuasive demonstration to the contrary, this Court must conclude only that the Virginia Supreme Court has denied requested relief because it determined in good faith that the requests had no merit.

> court in order to form the basis for relief in [federal] habeas. . . . Claims not so raised are considered defaulted.

523 U.S. at 375 (citations omitted). The Court then went on to explain that AEDPA's § 2254(e)(2) applied to Breard's claim that never had been raised in state court, and effectively precluded him from being able to demonstrate the required "prejudice":

> [I]n 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner . . . will, as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. §§ 2254(a), (e)(2) (Supp. 1998). Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule, just as any claim arising under the United States Constitution would be. ***This rule prevents Breard from establishing that the violation*** of his Vienna Convention rights ***prejudiced him. Without a hearing, Breard cannot establish*** how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him.

Id. at 376 (emphasis added).

Williams' claims involving Juror Stinnett and Cruse's psychiatric report are defaulted because they never were raised in state court and could not be raised there now. *See* Va. Code §§ 8.01-654(B)(2); 8.01-654.1. The issue of a hearing is a moot point unless or until he demonstrates the "cause and prejudice" required to place the merits of his claims properly before the federal courts. And, even if Williams could meet those requirements, the district court would be prohibited from conducting a hearing unless he satisfies both

the "due diligence" and "innocence" requirements of § 2254(e)(2)(A)(ii) and (B).

It is undisputed that Williams cannot satisfy the "innocence" requirement of § 2254(e)(2)(B). (Pet. Br. 25). This failure, by itself, is sufficient to preclude a hearing. For the reasons that follow, however, it is equally clear that Williams also cannot demonstrate "cause" for his defaults, the "due diligence" required by § 2254(e)(2)(A)(ii), or the "prejudice" required for the granting of relief:

A. Juror Stinnett

One of Williams' defaulted claims is that Juror Stinnett was untruthful during voir dire. (JA 459-65). Another is that the prosecutor knew the juror was untruthful and failed to disclose that fact. (JA 475-77). Neither of these defaulted claims is capable of supporting collateral relief.

1. Facts

The judge asked a group of jurors including Stinnett whether anyone was "related" to any of the prospective witnesses, including Deputy Sheriff Claude Meinhard. Stinnett did not respond affirmatively. (JA 39-40). The judge also asked whether anyone had "ever been represented" by any of the attorneys in the case. Again, Stinnett did not respond affirmatively. (JA 33).

The divorce between Stinnett and Meinhard has been a matter of public record since their divorce decree was entered in 1979. (JA 483-85). They had married in 1962 and had four children, the youngest being born in 1972. At the time of petitioner's trial, then, the youngest child was 21. (JA 484, 627). Stinnett and Meinhard separated in 1977, and their divorce was uncontested. (JA 484, 628). The divorce decree shows that Stinnett was the complainant and Meinhard the

defendant. "Robert G. Woodson, Jr." is referenced as the complainant's counsel.[19] (JA 485).

When Williams raised his claims in federal court, the juror provided an affidavit in which she averred that, since their divorce in 1979, she and Meinhard have had very infrequent contact, having occasion to speak to each other only one or two times per year. (JA 627). She ***never*** has spoken to Meinhard about Williams' case and the fact that Meinhard was a witness at trial "made no difference to [her] one way or the other, and certainly didn't cause [her] to favor the Commonwealth or the defendant." (JA 627). Because the divorce was uncontested, she did not consider Woodson to have "represented" her. (JA 628). Because she and Meinhard had been divorced in 1979, she did not consider Meinhard to be "related" to her at the time of trial. (JA 627).

At the time of trial, Woodson was the Commonwealth's Attorney in Cumberland County. He now is a Virginia trial judge. (JA 629). Like the juror, Judge Woodson also provided the district court with an affidavit in response to Williams' claims. (JA 629-30). While he was aware that Stinnett had been married to Meinhard years ago, because of their divorce Woodson did not consider them to be "related" at the time of trial. He has no recollection of the specifics of Stinnett's voir dire but, if he had heard her being asked if she was "related" to any witness, he would not have expected her to say that she was "related" to Meinhard. (JA 629). Even today, Judge Woodson has no recollection of having been involved in Stinnett's divorce proceedings. (JA 629-30). "Whatever [his] involvement was in the 1979 divorce, by the time of trial in 1994, [he] had completely forgotten about it." (JA 630).

Meinhard was a prosecution witness (JA 66-72) but, in terms of establishing petitioner's guilt, his trial testimony was so insignificant that the defense elected not even to cross-

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[19] The decree was signed by Williams' trial judge, John R. Snoddy, Jr. (JA 459; CA4 JA 844). Williams never has alleged that the judge should have remembered signing the divorce decree.

examine him. (JA 72). Although Meinhard was one of two officers who initially interviewed him, Cruse told the police nothing of value when Meinhard was present and Meinhard was not present when Cruse later admitted his role in the murders. (JA 69, 72).

2. No "Cause" or "Due Diligence"[20]

As the Fourth Circuit correctly found, "[t]he documents supporting Williams' . . . claims [about the juror] have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well." (JA 659). Although Williams suggests that his state habeas counsel reasonably relied on the truthfulness of Stinnett's answers on voir dire (Pet. Br. 29, 35), he cannot contend seriously that state habeas counsel subjectively had no reason to investigate the jurors. The record shows that Williams' state habeas petition raised a claim regarding Juror Blanton. (JA 388-91). He also filed a request for a court-appointed investigator to interview the jurors alleging, in conclusory fashion, that there were "irregularities, improprieties and omissions . . . with regard to the impaneling of the jury." (JA 358). Thus, it is quite obvious that state habeas counsel did ***not*** rely upon the truthfulness of the jurors' responses on voir dire.

Williams also contends that this Court should find "cause" for his failure to raise his claims regarding Stinnett in state court based upon the fact that the Virginia Supreme Court denied his request for an investigator. According to petitioner, he discovered the factual predicate for his claim only because his federal habeas counsel was willing and able

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[20] While a petitioner's "due diligence" or lack thereof does not determine whether he "failed to develop" the factual basis for his claims in state court, even if this Court were to conclude that it does, Williams' lack of "due diligence" is clear.

to pay an investigator. (Pet. Br. 32, 35). This contention, however, will not withstand scrutiny.

A review of the affidavit of Williams' investigator shows that the factual predicate for the claims was easily discovered: she merely interviewed a total of five jurors, two of whom told her that Stinnett was the ex-wife of Meinhard. (JA 493-94). That information then was readily confirmed by resort to local court records. (JA 483-85).

Williams' state habeas attorney was appointed in August of 1995. (JA 625). The amended state petition was not filed until late January of 1996. (JA 376-92). Given that Williams apparently believed there was reason to investigate the jurors (JA 358), there is no reason that his state habeas counsel could not have interviewed ***all*** the jurors (let alone merely the ones later interviewed by the investigator) during the five months between his appointment and the filing of Williams' amended petition. Conducting such interviews is hardly the type of task that can be conducted only by an "investigator."[21] Because the state court appointed Williams an attorney who clearly could have discovered the basis for the claims with the exercise of due diligence, a finding of "cause" or "due diligence" cannot be premised upon the state court's denial of Williams' conclusory request for an investigator. The errors or omissions of state habeas counsel clearly cannot constitute "cause."[22] *See Coleman*, 501 U.S. at 754; *see also* § 2254(i). (Resp. App. 5).

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[21] Williams' investigator had no more "personal ties" to the Cumberland area than did petitioner's state habeas attorney. (Pet. Br. 32). Williams describes his discovery of the information about Juror Stinnett as "serendipitous" and "fortuitous." (Pet. Br. 13 n.11). The fact remains, however, that state habeas counsel apparently believed there was reason to interview the jurors. (JA 358). If he had done so, there is no reason to believe that he would not have discovered the same information learned by the investigator.

[22] The district court's conclusion that there was "cause" for Williams' default (JA 558) is inexplicable given the court's conclusion that he had not established "cause" for the default of his claim regarding Cruse's

Williams, moreover, misapprehends the concept of "cause." While "cause" may be premised upon a showing of an "external impediment" which either "prevented" the prisoner from raising the claim or made the raising of the claim "impracticable," *see Carrier*, 477 U.S. at 488, 492, it cannot be based merely upon a state judicial ruling denying the prisoner's request for assistance. Otherwise, what heretofore has been a prohibition against a State preventing or making impracticable the prisoner's raising of a claim would be transformed into a requirement that the State not oppose his requests for assistance and affirmatively help the prisoner upon request. This Court certainly never has authorized such a mutation of the "cause" requirement.[23]

Finally, as the Fourth Circuit concluded, Williams' request for an investigator was patently "deficient" and "in no way alerted the state habeas court to any specific claim." (JA 659). He offered no support for his vague allegation of "irregularities, improprieties and omissions" with respect to the jury and no explanation as to why habeas counsel could not interview jurors without the assistance of an investigator. (JA 358, 367-68). In short, he asserted nothing in state court that could not be asserted by ***any*** prisoner in ***any*** case. The Court of Appeals, therefore, clearly did not err in concluding that "[t]he failure to develop the . . . claims [relating to Stinnett] was thus attributable to petitioner, not to the Supreme Court

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psychiatric report. (JA 560-61). (See below at 32). In both instances, the factual predicate for the claim was equally available upon the exercise of due diligence. In any event, the district court's conclusion that the claims involving Juror Stinnett were "not reasonably available to defense counsel" (JA 558) is, for the reasons stated in the text, clearly erroneous.

[23] "Impracticable," as used by this Court in the context of "cause," does not mean the same as "impractical." *See* Webster's at 1136. Moreover, it would be completely illogical, as well as inimical to the interests of comity and federalism, to base a finding of "cause" upon the state court's denial of a request for an investigator in Williams' case ***because the district court denied a similar request***. (JA 448-53).

of Virginia's rejection of a fishing expedition request." (JA 659-60).

3. No "Prejudice"

Even if Williams somehow could demonstrate "cause" for his default, he could not demonstrate the required "prejudice." As the Fourth Circuit found:

> Williams' claims with respect to juror Stinnett were marginal. It is hardly clear that Stinnett was related to Deputy Sheriff Meinhard given that the two divorced some fifteen years before Williams' trial. Furthermore, Meinhard's testimony was brief and did not speak to the critical facts of the trial. In fact, Williams' trial attorneys saw no need to cross-examine him. And the prosecutor explained his failure to notify the court of the relationship in an affidavit in which he stated that he simply did not remember being involved in Stinnett's divorce – a plausible claim given that the divorce occurred fifteen years prior to Williams' trial and was uncontested. Finally, it is anything but clear that a divorce from one of the Commonwealth's witnesses would predispose a juror towards the Commonwealth's case.

(JA 662-63).

Under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), Williams cannot possibly prevail unless he shows that Stinnett "failed to answer honestly a material question on voir dire" ***and*** "that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 555-56.[24] Given the length of time that Stinnett had been

[24] *McDonough* was a direct appeal federal civil case. The burden a § 2254 petitioner must carry is at least as demanding as the test established in *McDonough*. Contrary to Williams' assertion (Pet. Br. 47 n.33), the facts of this case do not present the "extreme situation" where bias may be "implied" because a juror was "a close relative of one of the participants in the trial." *See Smith v. Phillips*, 445 U.S. 209, 222 (1982) (O'Connor, J., concurring).

divorced from Meinhard, it would be impermissible for a federal habeas court to decide years after the fact that the juror's answers were in any sense "dishonest." *See McDonough*, 464 U.S. at 555 (emphasizing that average juror "may be uncertain as to meaning of terms which are relatively easily understood by lawyers and judges"). Here, as in *McDonough*, "[t]o invalidate the result of a [lengthy] trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *Id.* Moreover, even if the juror's answers somehow could be deemed "dishonest," disclosure of the fact that she once had been married to Meinhard, or that the prosecutor assisted her in the 1979 uncontested divorce proceedings, would not have been a valid basis for a challenge for cause under Virginia law. *See Lilly v. Commonwealth*, 499 S.E.2d 522, 531 (Va. 1998) (juror related to officer/witness not excludable for cause), *vacated on other grounds*, 119 S.Ct. 1887 (1999); *Roach v. Commonwealth*, 468 S.E.2d 98, 109 (Va.) (juror who is former client of prosecutor not excludable for cause), *cert. denied*, 519 U.S. 951 (1996). The fact that Williams may have found such information useful in exercising his peremptory strikes (Pet. Br. 47) is constitutionally irrelevant. *See McDonough*, 464 U.S. at 555 (drawing distinction between exclusions for cause and peremptory challenges); *see also Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("peremptory challenges are not of constitutional dimension").

B. Cruse's Psychiatric Report

Another claim that Williams raised for the first time in his federal petition was an allegation that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the report of Cruse's psychiatric evaluation. (JA

474-75). The district court did ***not*** grant Williams an evidentiary hearing on this claim, concluding that it was defaulted by virtue of his failure to raise it in his state petition. (JA 559-61). On appeal, the Fourth Circuit affirmed the district court's ruling that the claim was defaulted under a pre-AEDPA, "cause and prejudice" analysis. (JA 661-62). The Court of Appeals also concluded that an evidentiary hearing on the claim was barred under § 2254(e)(2). (JA 660).

1. Facts

In September of 1993, ***not*** in connection with his prosecution, Jeffrey Cruse was evaluated by a prison psychiatrist in response to Cruse's complaint, "I can't stop having nightmares and crying." (JA 495-99). The relevant portions of the report are as follows:

> This is a 25 year old white male, currently an inmate at the Powhatan Correctional Center, following an event in which he participated in capital murder of a couple nearby. ***The patient has little recollection of the event, other than vague memories, as he was intoxicated with alcohol and marijuana at the time.*** He reports having done LSD two months prior in large amounts, "up to 12 hits at a time," and had been doing so for the past 10 months prior to that. ***Patient reports he was with another individual who had a record of having murdered people. The patient felt unable to say "no" to his partner's request to rob the couple and subsequently kill them. The patient has recurrent nightmares and visualizes the face of the woman that he killed. When attempting to describe this nightmare, he breaks openly into tears and his face reddens.***
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> * * *
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> The patient. . . . continues to feel worthless as a person, placated [sic] by the guards for what he's done, bringing him into helplessness, tears and anger. He has no hope for his future and has been thinking of suicide constantly.
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> * * *
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> Examination revealed a white male who appeared to have flat affect, low monotone speech, and was wearing prison clothing and shackles. He did not display impulsivity. He cried often and reddened his eye features during the interview, especially during topics in which he discussed the nightmares, as well as current treatment while in jail. This apparently is brought on by embarrassment. ***He stated he felt he might be killed if he did not follow through his partner in crime's instructions to kill the couple.*** . . . He described neurovegetative symptoms of major depression and post-traumatic nightmares, recurrent in nature, of the event.
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> * * *
>
> Cognitively, he was able to recall recent and remote events well, except for black-outs when he is drinking excessively or doing LSD, in the past two years.

(JA 495-96, 498, emphasis added).

When Williams raised the "*Brady*" claim in his federal petition, he included the report as an exhibit (JA 474-75, 483), but he offered no explanation as to how he had obtained it. ***Seventeen months later, after the district court ruled that the claim was barred by Williams' failure to raise the claim in state court*** (JA 559-61), Williams filed a motion to reconsider, asserting for the first time that the report had been found by his federal habeas counsel's investigator ***in Cruse's court file in Cumberland Circuit Court***. (JA 621). Williams also asserted that his state habeas counsel had reviewed this same file while preparing the state petition but that "the psychiatric report . . . was not there." (JA 621). The affidavit from state habeas counsel which Williams submitted, however, was not so unequivocal: "I have no recollection of seeing this report in Mr. Cruse's court file when I examined

the file."[25] (JA 625). One of the exhibits that Williams submitted with his state petition, moreover, was a transcript of Cruse's sentencing proceeding on April 26, 1994, wherein Cruse's counsel made several references to reports concerning his client's mental health (JA 416-17, 423-24), including the following:

> ***The psychiatric report*** goes on to point out that he is significantly depressed. He suffered from post traumatic stress. His symptoms include nightmares, sleeplessness, sobbing, reddening of the face, severe depression, flash backs, nightmares, in particular. . . . Seeing the pictures, he says he sees the pictures coming at him time and time again.

(JA 424, emphasis added).

2. No "Cause" or "Due Diligence"

The district court correctly concluded that Williams had failed to demonstrate "cause" for failing to raise his claim in state court:

> Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded the same type of assistance at both state and federal habeas – namely, court-appointed attorneys. The Court cannot discern any reason and has been offered no explanation why state habeas counsel failed to discover the report and present it in state habeas proceedings.

(JA 560-61). The Fourth Circuit also correctly rejected Williams' assertion of "due diligence":

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[25] State habeas counsel did ***not***, as Williams asserts on brief, "recollect[ ] that the psychiatric report was not in Cruse's court file when counsel reviewed it." (Pet. Br. 48).

> In support of his claim that the Commonwealth suppressed the evaluation, Williams provides nothing more than an affidavit from his state habeas counsel attesting to "no recollection of seeing this report in Mr. Cruse's court file." In light of the fact that Williams' federal habeas counsel located the evaluation in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence. Indeed, that failure tends to show that counsel did not act diligently.

(JA 660).

Williams contends that his admitted failure to raise the claim in his state petition should be excused because his motions for discovery and for the appointment of an investigator were denied by the Virginia Supreme Court. This is nonsense. Leaving aside the perfunctory nature of both motions, as well as the fact that the district court also denied similar motions, neither discovery nor an investigator was necessary to find the report: ***his state habeas attorney, who was appointed by the trial court at state expense, merely went to the courthouse and examined Cruse's file which was accessible to any member of the public***. The mere fact that state habeas counsel either did not see or recognize the supposed significance of the report does not alter the fact that the court file and report plainly were available without the assistance of court-ordered discovery or the appointment of an investigator.

Williams' state habeas counsel also was on notice of the existence of the report by virtue of the transcript of Cruse's sentencing proceeding which Williams submitted as an exhibit with his state petition. (JA 415-28). In that transcript, Cruse's attorney made reference to several reports regarding Cruse's mental health, including a "psychiatric report" which closely mirrored the report upon which Williams now relies. (JA 416-17, 423-24). Given Williams' undeniable awareness of the existence of such reports, he cannot possibly demonstrate either "cause" for his default or that the factual predicate for his claim "could not have been previously discovered

through the exercise of due diligence." *See* § 2254(e)(2)(A)(ii). And, given the fact that Williams' state habeas counsel was investigating possible *Brady* claims regarding Cruse, and knew from Cruse's sentencing transcript about the existence of a psychiatric evaluation of Cruse, diligent counsel obviously would have pursued the matter further even if, as Williams alleges, counsel did not find such a report in Cruse's court file.

Williams again attempts to distort the concept of "cause" by relying upon the fact that the Warden's counsel did not agree to his informal discovery request[26] and that the Virginia Supreme Court denied his subsequent motions for discovery and for the appointment of an investigator. (Pet. Br. 30). This Court never has suggested that, unless the State affirmatively assists a prisoner upon request, there is "cause" for the

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[26] The Warden's counsel informed Williams' counsel that any discovery requests should be directed to the Virginia Supreme Court in a motion pursuant to the applicable state court rule. (JA 352-54). Williams suggests that the denial of his request for informal discovery violated a continuing duty under *Brady* to disclose exculpatory evidence. (Pet. Br. 30-31). *Brady's* due process guarantee, however, applies only "[a]t trial" and, "after a conviction the prosecutor is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt on the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). Under no stretch of the imagination did *Brady* require the Warden to agree to informal discovery in Williams' civil, habeas proceeding. The *ad hominem* amicus brief filed by a group of law professors is misguided for at least two reasons. First, its thrust is that a federal habeas court should enforce alleged violations of a prosecutor's ***ethical*** duties, as opposed to duties imposed by the Constitution. This Court does not have the authority to create such a rule even if it were inclined to do so and, even if it had the authority, it could not do so here without violating the "new rule" doctrine. Second, the alleged ethical violation attributed to the Warden's counsel is based upon a false premise, *i.e.*, that counsel knew of the existence of Cruse's psychiatric report during the state habeas proceedings, yet failed to disclose it. ***The Warden's counsel was unaware of the report until Williams filed it as an exhibit attached to his federal habeas petition.***

prisoner's failure to raise a claim during state court proceedings.

Finally, even if such flyspecking of state collateral proceedings by a federal habeas court were warranted, the motions that Williams filed in the Virginia Supreme Court were entirely perfunctory and unsupported by any specific allegation of fact that conceivably could justify a conclusion that the state court's denial of such motions supports a finding of "cause." Williams' discovery motion broadly requested "all documentation relating [to] the incarceration of Mr. Cruse from his date of his first incarceration in connection with [the] capital murder charges." (JA 371). The motion contained no support for such a request other than a purely conclusory assertion that Williams' counsel "must talk to Mr. Cruse and obtain records relating to his incarceration."[27] (JA

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[27] The ACLU simply is wrong when it asserts that Williams filed a discovery motion with the Virginia Supreme Court asking "for any *Brady* materials in the state's possession" and specifically "for psychological reports that might have been used at trial to undermine the credibility of Cruse." (ACLU Br. 1). The only discovery motion Williams filed in the Virginia Supreme Court was the limited one described in the text. (JA 371-72). Petitioner's ***informal***, letter request for discovery was a lengthy, omnibus-style *Brady* request, including a general request for "psychiatric reports." (JA 344-51). When the Warden's counsel declined informal discovery (JA 352-54), Williams chose not to file such an omnibus request with the Virginia Supreme Court. Contrary to Williams' assertion (Pet. Br. 31), this Court's decision in *Strickler* has no application here. ***In view of the fact that Williams' state habeas counsel clearly thought there was reason to investigate and, indeed, raised Brady claims involving Cruse*** (JA 379-88), counsel obviously did not rely on anything the prosecution did at the time of trial. *See Strickler*, 119 S.Ct. at 1952 ("cause" based, in part, upon state habeas counsel's reliance upon prosecutor's "open file" policy at trial). And, the Warden's response to Williams' request for informal discovery was the precise ***opposite*** of the representation during the state habeas proceedings in *Strickler* which this Court construed as an assurance that all *Brady* material already had been disclosed at the time of trial. *Id.* at 1951. Indeed, the letter to Williams' state habeas counsel made absolutely no such assurances, and stated that the Warden's counsel would

372). Williams' request for an investigator was equally lacking. The opening paragraph stated that Williams was requesting "an investigator to examine issues relating to the testimony and status of . . . Jeffrey Cruse" (JA 355), but the body of the motion made no attempt to justify the appointment of such an investigator. The only discussion of Cruse in the motion was in the context of a request for the appointment of an "expert attorney" to pursue ineffective counsel claims related to trial counsel's handling of Cruse's trial testimony. (JA 357-58). Moreover, even if the discussion of Cruse in the motion could be construed as relating to a request for an "investigator," the fact is that, by the time the Virginia Supreme Court denied Williams' motion (JA 444-45), the prosecutor and Cruse's trial attorney both had submitted affidavits unequivocally refuting Williams' unsupported allegation that Cruse had an undisclosed agreement with the prosecution. (JA 440-42). No court could be faulted for denying Williams' motions under these circumstances. Indeed, ***the federal district court also denied Williams' request for an investigator (JA 448-53, 621) and repeatedly found that he had not demonstrated the "good cause" required for discovery.*** (JA 520, 633). A state court simply cannot be faulted or penalized for denying a motion that subsequently is denied by a federal court.

3. No "Prejudice"

The Fourth Circuit concluded that, even if Williams could show "cause" for his default, he still would be unable to show the required "prejudice" because, in view of his own

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not review the State's files to determine if all *Brady* material had been disclosed at the time of trial and that any discovery must be in the context of a formal motion. (JA 352-54). The Warden's counsel certainly did not, as Williams suggests, "represent[ ]that any such items would have been disclosed pretrial." (Pet. Br. 38). ***The fact that Williams raised Brady claims regarding Cruse in his state petition establishes beyond dispute that he did not rely on any such purported representation.***

highly inculpatory testimony, there is no likelihood "the outcome of the case . . . would have been different" if trial counsel had been aware of Cruse's psychiatric report.[28] (JA 662). A review of the report in its entirety confirms the Fourth Circuit's conclusion.

Trial counsel, of course, could have attempted to impeach Cruse on the basis of his reported statement that he had "little recollection of the [capital murder], other than vague memories, as he was intoxicated with alcohol and marijuana at the time."[29] (JA 495). But, whatever good this may have done

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[28] Even though Williams obtained affidavits from his trial counsel regarding other matters (JA 395-400), he never has proffered any evidence that his trial attorneys were unaware of the report or that they did not determine, for the reasons set forth in the text, that bringing the report to the jury's attention would have done more harm than good. Nor has Williams ever proffered any reason to believe that any agency of the Commonwealth other than the Department of Corrections was aware of the report at the time of Williams' trial. *See United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) ("imposition of an unlimited duty . . . to inquire of other offices not working with the prosecutor's office on the case . . . would [create] a state of paralysis"); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir.) (prosecutor has no duty "to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue"), *cert. denied*, 519 U.S. 868 (1996). ***Indeed, given the reference to the report in the transcript of Cruse's sentencing proceeding (JA 424), there is no reason to believe that the prosecution or any investigative arm of the Commonwealth was aware of the report until it was gathered in connection with Cruse's presentence investigation that was ordered at the conclusion of his guilty plea proceeding***. (JA 416-17; CA4 JA 445-46). Williams' attorneys had access to the contents of Cruse's presentence investigation. *See* Va. Code § 19.2-299(A) ("Any report so filed . . . shall be made available to counsel for any person who has been indicted jointly for the same felony . . . "). Williams' suggestion that the psychiatric report was "confidential" (Pet. Br. 12) is unfounded.

[29] It is dubious, at best, that defense counsel would have attempted to impeach Cruse on the basis of his alcohol and marijuana use, even if they had known about the report. Cruse had admitted drinking alcohol prior to the crimes (JA 75-76) and other prosecution witnesses already had testified that Cruse and Williams had been "drinking heavily." (Tr. 1-4-94 at 45, 52;

would have been more than offset by the remainder of the report. *See generally Clere v. Commonwealth*, 184 S.E.2d 820, 821 (Va. 1971) (after witness' testimony attacked with prior inconsistent statement, proper for prosecution to introduce prior consistent statement and for court to admit both statements for jury's consideration). The report reflected that Cruse had stated that, because he knew that Williams "had a record of having murdered people," he "felt unable to say 'no' to [Williams'] request to rob the couple and subsequently kill them" (JA 495) and that "he might be killed if he did not follow [Williams'] instructions to kill the couple." (JA 498). This not only would have revealed to the jury that Williams already was a murderer before he committed the capital crimes, but would have bolstered the prosecution's effort to portray Cruse as a more sympathetic character than Williams (JA 269, 283-84), by repeatedly detailing the mental anguish Cruse had experienced as a result of the crimes, including "recurrent nightmares and visualiz[ations] of the face ***of the woman he killed***." (JA 495, emphasis added). Thus, even if it could be concluded that disclosure of the report would have created a ***possibility*** of a different outcome at the guilt stage of trial, given the entirety of the report and Williams' own

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CA4 JA 76). Williams, moreover, had told his trial counsel that, as he would later testify, he and Cruse had drunk "a lot of beer" and smoked marijuana. (JA 223, 433). Knowing all this, trial counsel wisely made no attempt to cross-examine Cruse about his alcohol and drug consumption. (JA 140-56). The reason for this tactic is clear. As trial counsel's affidavit demonstrates, Williams had decided that he was going to testify at the guilt stage and was insistent "that he wanted to tell the jury what had occurred." (JA 438). Because there was no evidence that Cruse was any more intoxicated than Williams and, because Williams purported to remember the relevant events "in great detail" and was going to relate those details to the jury (JA 433), any attempt to impeach Cruse's memory of the events on the basis of his drug and alcohol use would have had a similar impact on the credibility of Williams' testimony which was, after all, the ***sole*** focus of his guilt-stage defense.

inculpatory testimony (see above at 10 n.8),[30] there is no ***probability*** of a different result. *See Strickler*, 119 S.Ct. at 1953 (emphasizing that petitioner's burden is to show "reasonable probability," not merely "reasonable possibility").[31]

III. SECTION 2254(e)(2) APPLIES TO WILLIAMS' CLAIM ALLEGING AN UNDISCLOSED AGREEMENT BETWEEN HIS CO-DEFENDANT AND THE PROSECUTION, AND THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT THE STATE COURT REASONABLY REJECTED THE CLAIM ON THE BASIS OF THE UNCONTRADICTED EVIDENCE PRESENTED DURING STATE COLLATERAL PROCEEDINGS.

It is important to understand that, with respect to this particular claim, Williams is demanding an evidentiary hearing, ***not*** to prove the truth of any fact or the credibility of any evidence that he actually has proffered to the federal courts, but merely to serve as a fishing expedition to uncover facts

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[30] Williams suggests that the Warden somehow has admitted that credibility was the key to whether he could be convicted of capital murder (Pet. Br. 10-11, 40 n.26), but the Warden's statement he relies upon clearly indicated that, if the jury believed Williams, "Cruse fired all . . . but one of the shots that killed Mr. Keller" (JA 366-67), *i.e.*, that Williams admitted firing one of the shots that killed Mr. Keller and, therefore, was guilty of capital murder.

[31] Prior to his merits brief in this Court, Williams never claimed that there is a reasonable probability that the result of the ***penalty*** stage would have been different if the psychiatric report had been disclosed. This belated argument (Pet. Br. 43) should not be considered because it was not raised in the court below or even in Williams' certiorari petition. In any event, the argument is frivolous. Petitioner was so lacking in remorse that, when he was arrested approximately a week after the murders, he still was wearing Mr. Keller's leather jacket as a trophy. (JA 220, 247). And, once the jury learned ***that Williams had murdered four other men just two months prior to the Keller murders***, his death sentence was, if not absolutely assured, at least extremely probable.

which he hopes might support his claim, and as a vehicle for a federal judge to redetermine the credibility or weight of the evidence that was before the state court when it rejected his claim. AEDPA certainly does not permit an evidentiary hearing under such circumstances.

It likewise is important to understand the inter-relationship of the various provisions of AEDPA when dealing with a claim that was presented in state court and rejected on the merits. As the Fourth Circuit correctly concluded, § 2254(d) provides the primary standard for assessing such claims. (JA 663-64). Under that provision, the writ "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless" the prisoner shows that the state court decision either "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]" or "was based on an unreasonable determination of the facts ***in light of the evidence presented in the State court proceeding***." *See* § 2254(d)(1)-(2) (emphasis added). (Resp. App. 3-4). If the prisoner's claim does not fall within one of § 2254(d)'s two exceptions, Congress' general prohibition applies and the claim ***must*** be rejected. Sections 2254(e)(1) and (e)(2) thus come into play only if the prisoner is able to escape the strictures of § 2254(d).

Assuming that relief is not barred under § 2254(d), however, a federal court still would be required to presume the correctness of any state court factual determinations, unless the prisoner carries "the burden of rebutting the presumption . . . by clear and convincing evidence." *See* § 2254(e)(1). (Resp. App. 4). And, in any event, the federal court would be prohibited from conducting a hearing unless the prisoner shows that the lack of factual development is not attributable to him, *see* § 2254(e)(2)(A)(i)-(ii), ***and*** demonstrates "by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." *See* § 2254(e)(2)(B).

The Fourth Circuit correctly analyzed Williams' claim within this framework and determined that it must be rejected, whether pursuant to § 2254(d) or de novo:

> Williams . . . claims that the prosecution suppressed an alleged informal plea agreement that the Commonwealth had with Cruse in violation of *Brady*. ***The Supreme Court of Virginia was correct, however, to reject Williams' claim***. In state court the Commonwealth supplied two affidavits – one from [prosecutor] Woodson and one from Cruse's trial counsel, Donald Blessing – stating unequivocally that Cruse had no agreement. Specifically, Woodson swore, "At the time Cruse testified against Williams in January of 1994, he had no plea agreement. ***Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty."*** ***Similarly, Blessing stated, "Cruse testified truthfully at . . . trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence."***
>
> ***Moreover, before the district court, the Commonwealth introduced another affidavit from Blessing, in which he swore, "At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth."***[32] The district court

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[32] This second affidavit from Mr. Blessing was submitted after Williams' federal habeas counsel had asked Blessing to sign an affidavit which inaccurately stated that Cruse "did have an understanding with the Commonwealth that if he cooperated . . . and testified against Williams, his cooperation and testimony might help him. . . . " (JA 501, 504). Blessing refused to sign the affidavit presented to him by Williams' counsel because it was "not true." (JA 501). In the subsequent affidavit that Blessing executed, he averred not only that there was no such agreement or understanding between Cruse and the prosecution, but also that he never

> thus properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's determination in a federal hearing in view of the unrefuted evidence.

(JA 664-65, emphasis added). Because the Fourth Circuit did not apply § 2254(e)(2) to this claim, the Court of Appeals' judgment will remain unaffected by this Court's interpretation of the statute. Indeed, given that this Court granted certiorari only to resolve Williams' question concerning the proper interpretation of § 2254(e)(2) and, in view of the Fourth Circuit's rejection of Williams' "secret agreement" claim under § 2254(d), the claim is not properly before the Court. Nevertheless, as will be demonstrated, § 2254(e)(2) clearly precludes a hearing on this claim.

A. No "Due Diligence"

The total facts which Williams says entitle him to an evidentiary hearing are as follows: Cruse had a written agreement with the prosecution that was revoked prior to trial (JA 151-52, 162-63); despite the revocation of the agreement, Cruse continued to cooperate with the prosecution and agreed to testify against Williams (JA 397); no trial date was scheduled for Cruse until after he testified against Williams (JA 384); Cruse admitted in his testimony against Williams that he was guilty of the capital murder of Mrs. Keller (JA 103-04); the prosecutor's redirect examination of Cruse and his jury argument supposedly indicated that Cruse still had an

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had stated or implied to Williams' counsel, or anyone else, that there was such an agreement or understanding. (JA 501-02). Any assertion by petitioner that Blessing "indicated [to federal habeas counsel] there was an understanding" between Cruse and the prosecution (Cert. Ptn. Reply 13 n.10) not only is false, but also is contrary to Williams' own (again, unsupported) assertion in the district court that during "discussions . . . with Cruse's counsel about additional affidavits, Cruse's counsel ***has not completely refuted the possibility*** that some inducement from the Commonwealth existed." (JA 502 at ¶ 4, emphasis added).

agreement with the prosecution whereby he would be spared a death sentence (JA 159, 284);[33] and two months after Williams' trial, Cruse pleaded guilty and subsequently was sentenced, upon the prosecutor's recommendation, to multiple terms of life imprisonment. (JA 401-28).[34]

Williams' trial attorney cross-examined Cruse about the revoked agreement and about whether he was, in fact, testifying without the benefit of an agreement with the prosecution. (JA 149-52). ***The prior written agreement was disclosed fully to the jury and, in fact, was made an exhibit by the prosecution.*** (JA 151, 157-58, 162-63, 431-32). Cruse's two trial attorneys, moreover, were present in the courtroom when he testified (JA 159, 431, 442), but Williams made no effort to

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[33] In his state habeas petition, Williams did not rely at all upon the prosecutor's redirect examination of Cruse and mentioned the prosecutor's jury argument only in connection with a related ineffective counsel claim. (JA 378 at ¶ 142). Williams' federal petition, however, asserted that, based upon the prosecutor's redirect examination of Cruse, "[t]he conclusion is inescapable that the Commonwealth and Cruse had an understanding regarding a sentencing recommendation" and that "[t]he only reasonable inference from [the prosecutor's jury argument] is that there was a direct relationship between the content of Cruse's testimony and his sentence on charges of capital murder." (JA 472-73).

[34] Cruse received three consecutive life sentences, plus 90 years. (JA 427-28). Williams simply is wrong when he says that a charge against Cruse for the killing of Mr. Keller was reduced from capital murder to first-degree murder. (Pet. Br. 15 n.14). As the district court noted (JA 578) and the record shows (JA 404), the only change in the charge regarding Mr. Keller was to amend a first-degree murder charge to note Cruse's participation as a principal in the second-degree. Contrary to Williams' allegation (Pet. Br. 43 n.29), this amendment was not premised upon Cruse's testimony that he had not fired any "fatal" shots at Mr. Keller, but rather upon the fact that he had not fired ***any shots at all*** at Mr. Keller. Petitioner also is wrong in asserting that the district court found that "a reasonable reading of the record as a whole suggests the existence of a deal." (Pet. Br. 36). The district court did no such thing; it merely listed the circumstances which "Williams argues . . . strongly suggests that some sort of . . . agreement existed." (JA 578).

call them as witnesses to examine them about the possible existence of a continuing agreement. ***Indeed, Williams separately alleged that his trial attorneys were ineffective in failing to call the prosecutors or Cruse's attorneys as witnesses to develop the record***. (JA 358, 377; CA4 JA 772). And, although Williams later claimed in his federal petition that "the only reasonable inference" from the prosecutor's argument to the jury was that there was, in fact, such a continuing agreement, Williams made no effort at trial to develop the record on this point once he heard the prosecutor's allegedly telling remarks.[35]

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[35] The prosecutor argued to the jury that Cruse was a credible witness because "his back is against the wall; if he lies, he dies." (JA 284). Obviously, if, as Williams told the district court (JA 473), "the only reasonable inference" from such an argument is that Cruse still had an agreement with the prosecution, Williams could have pointed out to the trial judge the alleged discrepancy between Cruse's testimony and the prosecutor's argument and demanded a hearing at which the prosecutors and Cruse's attorneys could have been called as witnesses. The same is true, of course, to the extent Williams relies upon the fact that the prosecutor asked Cruse on redirect examination if it was his understanding that he remained charged with capital murder and that "the judge is going to decide whether you live or die." (JA 159). Any claim that these matters of record proved that the prosecution had failed to disclose a continuing agreement with Cruse obviously could have been raised and developed at trial and litigated on direct appeal. The Virginia Supreme Court did not rule Williams' "secret agreement" claim defaulted because, as previously noted, Williams did not rely upon either of the prosecutor's remarks in his state habeas petition, except in relation to an ineffective counsel claim. (JA 378). The state court, however, did rule that two other aspects of Williams' *Brady* claim were defaulted because they could have been raised at trial and on appeal. (JA 444, applying rule of "*Slayton v. Parrigan*" to claims "IV(A), IV(B)"; see also JA 379-84). In any event, the prosecutor's "if he lies, he dies" argument was nothing more than a recognition of the fact that the one thing Cruse could do to maximize his chances of being sentenced to death would be to lie under oath about his involvement. As for the prosecutor's question, and Cruse's acknowledgement, that "the judge" would decide his fate, this represented merely a realistic assessment that, having confessed both to the police and under oath in court that he had

In his state habeas petition, Williams suggested that Cruse's written agreement with the prosecution never had been revoked (JA 386) and asserted, in conclusory fashion, that cross-examining Cruse at an evidentiary hearing "would certainly lead to substantial evidence of a continuing plea agreement." (JA 386-87). The Warden presented the affidavits from the lead prosecutor and Cruse's trial attorney which established that no agreement existed.[36] (JA 440-42). Neither before nor after the Warden submitted those affidavits, however, did Williams offer any support for his claim. He submitted no affidavits from his trial counsel on this point, even though he had obtained affidavits from both trial attorneys on other points. (JA 395-400). Nor did he submit affidavits from either of Cruse's two trial attorneys, even though one had provided an affidavit on a related matter. (JA 394-95). Williams thus made no proffer to the state habeas court that he

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raped Mrs. Keller and shot her in the head, Cruse had little or no prospect of mercy from a jury and that, under Virginia law, it is the trial judge who ultimately decides whether a death sentence will be imposed. *See* Va. Code § 19.2-264.5.

[36] Cruse had testified unequivocally under oath at trial that he was testifying without the benefit of any agreement with the prosecution, that he remained charged with capital murder and subject to a possible death sentence. (JA 135, 152, 159). Williams notes that the Warden produced no affidavit from Cruse during the state collateral proceedings in response to Williams' claim. (Pet. Br. 12 n.10). But, given Cruse's unequivocal trial testimony and, given Williams' failure to proffer any evidence in support of his naked claim, the Warden certainly had no duty to have Cruse reiterate his sworn, cross-examined testimony in affidavit form. Nor did the Warden have any duty, as Williams suggests, to obtain an affidavit from the assistant prosecutor from another jurisdiction who helped Mr. Woodson prosecute Williams' case. As the elected Commonwealth's Attorney in Cumberland County, Woodson was the person who had signed a written plea agreement with Cruse and later revoked it. (JA 163, 264). There is no reason to believe that the assistant prosecutor knew anything about Cruse's lack of an agreement other than what Woodson told him.

had interviewed his own trial attorneys, or either of Cruse's two trial attorneys, in an attempt to develop his claim.[37]

Williams did ask the Virginia Supreme Court to order the Commonwealth to make Cruse available to his habeas counsel[38] and to "produce all documentation" relating to Cruse's incarceration. (JA 371-72). As previously detailed (see Argument II at 35-36), those requests were entirely conclusory and unsupported by any specific allegations of fact. The Virginia Supreme Court denied Williams' motions at the same time it entered an order dismissing his habeas petition and expressly finding that his "secret agreement" claim had "no merit." (JA 444-45). By that time, however, the Warden had filed the affidavits from the Commonwealth's Attorney (who by then

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[37] It is significant that prior to trial Williams' attorneys discussed Cruse's expected testimony with Cruse's trial attorneys. (JA 431). Williams made no proffer to the state habeas court that he had contacted Cruse's trial attorneys to discuss the claim or even asked them to contact Cruse to see if he was amenable to an interview.

[38] The Warden's counsel had informed Williams' counsel that Cruse is incarcerated in an out-of-state location and that his location would not be disclosed to Williams. (JA 363). When Williams subsequently asked the Virginia Supreme Court to compel the Warden to make Cruse available, the Warden opposed the motion and represented that Cruse was being held at an out-of-state location in order to protect him from Williams. (JA 373-75). The Warden noted the conclusory nature of Williams' motion and that he had failed to proffer that he had attempted to pursue his claim by any means short of interviewing Cruse, such as interviewing his own trial counsel or either of Cruse's two trial attorneys. (JA 374-75). The Warden also pointed out that Williams had failed to proffer any reason to believe that Cruse was amenable to an interview. (JA 375). Indeed, the record shows that in 1997 an investigator working on Williams' behalf and employed by a state-funded agency wrote a letter to Cruse in care of the Virginia Department of Corrections and that the letter was forwarded to Cruse at his out-of-state location. (JA 521-23). Cruse obviously was not obligated to respond to the letter and apparently chose not to do so.

was a Virginia judge) and from Cruse's trial attorney, both unequivocally stating that there had been no "secret agreement" with Cruse. (JA 440-42).

To the extent Williams produced ***any*** evidence in state court relevant to the claim, it undermined rather than supported his allegation. The transcript of Cruse's guilty plea proceeding two months after Williams' trial clearly shows that, upon inquiry by the trial judge, Cruse confirmed that no one had made "any promises" and that he still was subject to a possible death sentence. (JA 409-10). Likewise, in the transcript of Cruse's sentencing proceeding, Cruse's attorney unequivocally informed the trial judge that Cruse had cooperated "without any promise of anything in exchange for his testimony." (JA 421).

When discussing the concept of a petitioner's "due diligence" in state court, one must assess whether new facts or evidence which the petitioner wants to present to a federal court could have been discovered and presented during the state court proceedings. In Williams' case, however, there are no such new facts. ***He presented no evidence to support his claim in either state or federal court***. He merely wants an evidentiary hearing to discover facts which he hopes might support his claim or to have a federal judge redetermine the credibility of the unequivocal and uncontradicted evidence upon which the Virginia Supreme Court relied when it rejected his claim. Such an abuse of an evidentiary hearing never has been warranted in our federal system and certainly is not permitted under AEDPA. *See generally* Rule 2(c), Rules Governing Section 2254 Cases (requiring petitioner to "set forth in summary form the facts supporting each of the grounds [for relief]"); *McFarland v. Scott*, 512 U.S. 849, 860 (1994) ("the habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims").

It would be both illogical and inappropriate to conclude that Williams used "due diligence" to develop his claim in state court simply because his motions for discovery and an investigator were denied by the Virginia Supreme Court.

Williams also asked the federal district court for the appointment of an investigator, in part to investigate whether Cruse had a secret agreement. (JA 450-52). The request was denied. (JA 8, 621). Likewise, he repeatedly asked the federal district court for various forms of discovery related to his claim that Cruse had a "secret agreement." (JA 505-19, 524-28, 614-18). ***The district court, however, on two separate occasions, in findings independently made by two different federal judges, concluded that Williams had failed to show the "good cause" required for discovery under Rule 6(a)***. (JA 520, 633).

Thus, at bottom, Williams' argument is that he is entitled to an evidentiary hearing to develop as yet unknown facts and that he used "due diligence" to develop those as yet unknown facts in state court, even though the federal district court, like the Virginia Supreme Court, denied his request for an investigator and found that there was no "good cause" for discovery. Merely to state such an argument is to demonstrate that a ruling in Williams' favor would make a mockery of both AEDPA generally and the concepts of "due diligence" and federalism specifically.[39]

B. No Merit

Williams cannot obtain relief unless he demonstrates that the undisclosed information was "material," *i.e.*, that there is

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[39] It would be difficult to overstate the adverse impact of federal evidentiary hearings upon the interests of comity, finality and federalism. Although "[f]ederal courts are not forums in which to relitigate state trials," *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), that is precisely what such hearings in capital cases have become. *See* Price-Waterhouse-Coopers, "Cost of Private Panel Representation in Federal Capital Habeas Corpus Cases from 1992 to 1998" (Feb. 9, 1999) at III-23 ("Many experienced federal capital habeas counsel described the preparation required for an evidentiary hearing ***as similar to that required for an entire capital trial***") (emphasis added). Federal hearings reportedly are granted in 83% of California capital cases and 40% of capital cases elsewhere. (*Id.* at V-79, VIII-119).

a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). And, there is a distinct and important difference between a "reasonable probability" and a mere "reasonable possibility" of a different result. *See Strickler*, 119 S.Ct. at 1953.

Here, the Fourth Circuit correctly concluded that, "even if Williams could demonstrate that Cruse had an informal plea agreement, he could not show materiality" and that "[g]iven Williams' own testimony that he was at least an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head,[40] we are confident there is no 'reasonable probability [that the outcome of Williams' trial] would have been different.' " (JA 665-66).

In other words, even if it were assumed for the sake of argument that Cruse still had an agreement with the prosecution by which he knew he would be spared a death sentence and, even if it were assumed that disclosure of that fact would have caused the jury to discredit Cruse's testimony and accept Williams' testimony in their respective entireties (an assumption far beyond anything to which Williams reasonably could be entitled),[41] there is no reasonable probability the jury would not have convicted Williams of capital murder, ***solely on the basis of his own testimony***. As even the district court concluded, "Williams' own testimony established that he shot Mr. Keller during the commission of robbery and subsequent to the rape of Mrs. Keller and that, therefore, he is guilty of capital murder." (JA 584, 645).

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[40] Williams admitted not merely that he was an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head, but also that he was a full participant in (indeed the instigator of) the robbery of the Kellers as well as the burning of their home. *See Williams*, 450 S.E.2d at 370. (JA 225-34).

[41] According to trial counsel, Williams "did not do well as a witness" because "his demeanor on the witness stand appeared very cold." (JA 438).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

John B. Taylor, Warden

DONALD R. CURRY
Senior Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4856

RESPONDENT'S APPENDIX

Relevant Provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA):

28 U.S.C. § 2244(b)

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

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28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue, made by a State court, shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * *

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Feb 18 2000

(12) (15)

Supreme Court, U.S.
FILED
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No. 99-6615

In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison, Waverly, Virginia,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

*Barbara L. Hartung
1001 E. Main St.,
Suite 504
Richmond, VA 23219
(804) 649-1088

John H. Blume
Keir M. Weyble
1247 Sumter St., Suite 202
Columbia, SC 29201
(803) 765-1044

James E. Moore
Christian & Barton, L.L.P.
909 E. Main St.,
Suite 1200
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT IN REPLY

Petitioner files this reply to address the single argument advanced in respondent's brief which was not anticipated and answered in the Brief for Petitioner, and to correct a pair of important inaccuracies in respondent's brief. Apart from these matters, respondent's brief fails on its face to sustain the extreme and unprecedented positions it advocates, most crucially and notably its perverse reading of § 2254(e)(2) as a strict-liability statute – a construction of AEDPA's evidentiary-hearing provision that goes beyond anything the Fourth Circuit opinion below explicitly undertook to defend, and which has been rejected by every court of appeals to have considered it. *See Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998); *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998); *Wilkins v. Bowersox*, 145 F.3d 1006, 1016 n.6 (8th Cir. 1998); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998); *Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997); *Love v. Morton*, 112 F.3d 131, 136 (3rd Cir. 1997).

I. Section 2254(e)(2) is not a strict-liability statute.

Respondent's strict-liability interpretation of § 2254(e)(2) rests entirely on the assertion that the statute must contemplate cases in which a habeas petitioner has "failed to develop the factual basis of a claim in State court proceedings" *despite* having exercised "due diligence," because the statutory text makes "due diligence" one of two conjunctive requirements for coming within the *exception* to § 2254(e)(2). Resp. Br. 15-19. Since Congress made "due diligence" an element of the exception

to § 2254(e)(2), respondent's argument goes, it could not have intended the section to be inapplicable in the first place to cases in which a petitioner had been diligent in state-court proceedings. Thus, in respondent's view, even if the lack of factual development in state court is in no way attributable to a habeas petitioner, a federal court cannot conduct an evidentiary hearing unless the petitioner satisfies § 2254(e)(2)'s very narrow exceptions.

But no English-speaking person who intended this result would use the language of § 2254(e)(2) to accomplish it. If Congress had intended to make the actions of the petitioner in the state courts completely irrelevant to the application of § 2254(e)(2), it would have written: "If the factual basis of a claim was not developed in State court proceedings, the federal court shall not hold an evidentiary hearing on the claim unless . . . ," or some similar, obvious formulation. This formulation is all the more obvious because it was in use in the pre-AEDPA case law that, according to respondent, Congress wished to reverse.[1] But Congress did not use any such language. Instead, Congress began § 2254(e)(2) with an "If" clause conspicuously featuring "the applicant" as the subject of the verb "has failed." Unless the words "the applicant" are read entirely out of the statute – in violation of the

---

[1] Prior to the enactment of AEDPA, the subject now governed by § 2254(e)(2) was governed by the rule of *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). As we shall see in a minute in the text, the *Keeney* opinion explicitly parsed and modified the well-known "fifth circumstance" of *Townsend v. Sain*, 372 U.S. 293 (1963). And the language of the fifth circumstance was, precisely: "the material facts were not adequately developed at the state-court hearing." *Id.* at 313.

basic, sensible rule that "[s]tatutes must be interpreted, if possible, to give each word some operative effect," *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997) (citing *United States v. Menasche*, 348 U.S. 528, 538 (1955); *see also Kawaauhau v. Geiger*, 118 S.Ct. 974, 977 (1998)) – § 2254(e)(2) comes into play only when "the applicant" has "failed" to develop the factual basis for a claim in the state courts.

Moreover, Congress borrowed the language of the opening clause of § 2254(e)(2) directly from this Court's opinion in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), a decision which on its face and in its common understanding has never barred the federal courts from receiving evidence when facts were not developed in state-court proceedings as a result of state interference. *See* Pet. Br. 23-28; *see generally Felker v. Turpin*, (AEDPA "codifies some of the pre-existing limits on successive petitions"); *Hohn v. United States*, 524 U.S. 236, 255 (1998) (Scalia, J., dissenting) (citing "the rule that statutes are deemed to adopt the extant holdings of this Court") (citation omitted). Respondent's refusal to recognize the parallel wording of *Keeney* and § 2254(e)(2) leaves it unable to read the statute coherently or with appropriate regard for context. *See, e.g., Evans v. United States*, 504 U.S. 255, 260 & n.3 (1992); *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98 (1991). As described in detail below, when the plain language of the statute is examined against the background of *Keeney* and the familiar circumstances of pre-AEDPA collateral review proceedings, it is respondent's – not petitioner's – interpretation of § 2254(e)(2) that emerges as producing a "nonsensical conclusion," Resp. Br. 17.

Both before and since the enactment of AEDPA, there have been at least four recognized, prototypical situations in which a federal habeas claim is advanced on the basis of evidence that was not developed in state court: (1) cases of interference by state officials, *see Amadeo v. Zant*, 486 U.S. 214, 222 (1988); (2) cases in which "the factual or legal basis for a claim was not available to [the petitioner or] counsel," *see Murray v. Carrier*, 477 U.S. 478, 488 (1986), *citing Reed v. Ross*, 468 U.S. 1, 16 (1984); (3) cases of attorney *error* (the situation in *Murray* itself and in *Coleman v. Thompson*, 501 U.S. 722 (1991)), and (4) cases of attorney *incompetence* (which is distinguished from mere attorney error in *Murray*[2] and again in *Coleman*[3]). These situations had not been explicitly distinguished at the time of *Townsend v. Sain*, 372 U.S. 293 (1963), but were well demarked in the case law by the time this Court decided *Keeney* thirty years later.

Keeney explicitly modified the so-called "fifth circumstance" of *Townsend*, which prescribed that a federal habeas petitioner would be given an evidentiary hearing in federal district court if "the material facts were not adequately developed at the state-court hearing." 372 U.S. at 313. *Keeney* replaced this rule with one holding

---

[2] *See Murray*, 477 U.S. at 488: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington* . . . , we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. . . . ¶ Ineffective assistance of counsel, [however,] . . . is cause for a procedural default."

[3] *See Coleman*, 501 U.S. at 752-753, quoting with approval the passage from *Murray* cited in note 2, *supra*.

that new evidence could *not* be received in federal habeas if the lack of factual development was the result of the petitioner's "failure to develop a material fact in state-court proceedings," 504 U.S. at 5, unless the petitioner showed "cause and prejudice." Thus, the initial evidence-preclusion rule of *Keeney* came into play if, but only if, a petitioner or petitioner's counsel *failed* to develop the facts in state court; an exception to the rule was recognized if, but only if, the failure was excused by cause-and-prejudice.

The cause-and-prejudice exception to the evidence-preclusion rule of *Keeney* was adopted *verbatim* from a line of this Court's prior case law featuring *Wainwright v. Sykes*, 433 U.S. 72 (1977). The *Sykes* case law had not undertaken to announce an exhaustive roster of circumstances constituting "cause," but had recognized at least three prototypical situations establishing "cause": (a) cases involving some interference by state officials with the development of a claim by petitioner's counsel; (b) cases in which counsel had failed to develop a claim because the factual or legal bases for it were not reasonably available, and (c) cases in which petitioner's counsel had failed to develop a claim because counsel was ineffective within the well-known standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Since situation (a) did not involve any "failure" on the part of petitioner or petitioner's counsel and would therefore not come within the *Keeney* rule in the first place, the major categories of "cause" theoretically eligible to be raised in the *Keeney* context were situations (b) and (c). As a practical matter in the wake of *Teague v. Lane*, 489 U.S. 288 (1989) – which sharply narrowed the range of cognizable claims in which

situation (b) could be demonstrated – efforts by federal habeas petitioners to show cause almost always took the form of assertions of ineffective assistance of counsel.

As described in petitioner's opening brief at pp. 26-28, AEDPA's § 2254(e)(2) followed the lead of *Keeney* in defining the circumstances that initially bring the evidence-preclusion rule into play. What § 2254(e)(2) changed was the *exceptions* to the rule. *See* Pet. Br. 25. Specifically, § 2254(e)(2) terminated the exception for "cause" – thus putting an end to ineffective assistance of counsel as a sufficient ground for exemption from the evidence-preclusion rule that § 2254(e)(2) adopted from *Keeney* – and established a narrower exception having two conjunctive elements: (a) due diligence (or a new, retroactive legal rule), and (b) innocence. As a result, § 2254(e)(2) *applies* – that is, the evidence-preclusion rule comes into play in the first place – only when a petitioner or his counsel has *failed* to develop evidence in the state courts. The ordinary situation in which the rule does *not* come into play is the state-interference situation, which is the situation presented in petitioner Michael Williams's case.

When § 2254(e)(2) *does* come into play, a petitioner can obtain an *exception* to its evidence-preclusion rule only by showing both due diligence in developing the factual bases for claims in the state courts (or a new, retroactive rule of law) and clear-and-convincing evidence of innocence. Putting aside the infrequent situation of a retroactive rule of constitutional law that can be invoked in federal habeas under *Teague*, the most common situation in which a petitioner who failed to develop evidence convincingly showing innocence in the state

courts can satisfy the "due diligence" requirement is the case hypothesized in *Strickland v. Washington* in which defense counsel makes a *reasonable* – and therefore not incompetent – professional judgment to limit investigation and thereby fortuitously fails to uncover factual information convincingly demonstrative of the petitioner's innocence. This case will be excepted from the evidence-preclusion rule of 2254(e)(2) – into which it does fall initially – under the explicit terms of subsection (e)(2)(ii) because the clear-and-convincing evidence of innocence "could not have been previously discovered through the exercise of due diligence."[4] On the other hand, cases in which the petitioner's state-court lawyer neither makes an adequate factual investigation nor "a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U.S. at 691, likewise fall within § 2254(e)(2)'s evidence-preclusion rule (since counsel failed to develop the facts for no reason external to the defense), but will *not* come within the "due diligence" exception to the rule (since "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation," *Strickland*, 466 U.S. at 690-91).

In sum, ineffective-assistance-of-counsel cases came within the initial *rule* of *Keeney* and within its *exception*.

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[4] Another, though rarer, situation is the case in which the petitioner's lawyer conducted a thorough-going investigation but the relevant facts were undiscoverable because of fortuities for which neither the petitioner nor the state was responsible, like the absence from the country of the sole witness to those facts.

Those cases also come within the initial *rule* of § 2254(e)(2), but they do not come within the statute's exception. Cases in which attorneys made a professionally reasonable judgment not to conduct an investigation and therefore failed to develop facts in state court came within the initial *rule* of *Keeney* but not within its *exception*. Such cases now come within the initial *rule* of § 2254(e)(2); they come within its *exception* if, but only if, clear-and-convincing evidence of innocence is also shown. Another, rarer class of case that comes within the rule *and* the exception to § 2254(e)(2) involves the situation envisioned by *Murray* as quoted in footnote 5 of *Keeney*, where the factual basis for a claim revealing clear-and-convincing evidence of innocence is not available to counsel until the federal habeas stage through no fault of counsel or of any state authority. *See* note 4 *supra*.

The existence of these varying situations is why respondent's brief is wrong when it characterizes petitioner's interpretation of § 2254(e)(2) as illogical for making the "rule" of § 2254(e)(2) coextensive with the first element of its two-element exception. Respondent's entire argument hinges upon its unwarranted assertion that under petitioner's interpretation of the statute, all cases coming within the "due diligence" half of the exception would have fallen outside of § 2254(e)(2) in the first place. But this is simply incorrect: rather, under petitioner's interpretation, the ordinary case in which § 2254(e)(2) does not *apply* to evidence undeveloped in the state courts is the state-interference situation. Cases where a petitioner or counsel failed to develop evidence in the state courts without having been impeded by state interference do come within § 2254(e)(2). In such cases,

the due-diligence *exception* to § 2254(e)(2)'s evidence-preclusion rule can be met only by showing that despite the due diligence of counsel, clear-and-convincing evidence of innocence went undeveloped in the state courts.

Apart from its unfaithfulness to the plain language of § 2254(e)(2) and the historical context in which the statute was enacted, respondent's idiosyncratic interpretation would also lead to perverse results in cases implicating other provisions of AEDPA. For example, under respondent's strict-liability reading of "failed to develop," a federal district judge who determines under § 2254(b)(1)(B)[5] that a petitioner should be excused from the ordinary exhaustion requirement because state corrective process is either unavailable or ineffective, would be required to review the merits of the petitioner's claim or claims *de novo* while being deprived of the ability to ascertain the facts relevant to the issues before the court.[6]

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[5] Section 2254(b)(1)(B) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> . . . .
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant

[6] A state's express waiver of exhaustion pursuant to § 2254(b)(3) would likewise require merits review with no opportunity for fact development. *See Lockhart v. Johnson*, 104 F.3d 54, 57-58 (5th Cir. 1997), *cert. denied*, 117 S.Ct. 2518 (1997) (amended § 2254(d) is inapplicable where a claim was not presented to the state courts and the state expressly waives the exhaustion requirement in federal habeas proceedings).

See Keeney, 504 U.S. at 19-20 (O'Connor, J., dissenting) ("Federalism, comity, and finality . . . are less significantly advanced, once [federal] relitigation [of a claim] properly occurs, by permitting district courts to resolve claims based on an incomplete record"); *id.* at 24 (Kennedy, J., dissenting) ("We consider today only those habeas actions which present questions federal courts are bound to decide in order to protect constitutional rights. We ought not to take steps which diminish the likelihood that those courts will base their legal decision on accurate assessment of the facts").

The same would hold true of claims wrongly determined by the state courts to be procedurally barred. Such claims are not subject to the mode of review prescribed by § 2254(d) by virtue of their not having been "adjudicated on the merits in State court proceedings," *see, e.g., Weeks v. Angelone*, 176 F.3d 249, 258 (4th Cir. 1999), *aff'd*, 68 U.S.L.W. 4060 (U.S., January 19, 2000); *Moore v. Parke*, 148 F.3d 705, 708 (7th Cir. 1998); *Hernandez v. Johnson*, 108 F.3d 554, 558 (5th Cir. 1997), but under respondent's reading of the evidence-preclusion provision of § 2254(e)(2), federal courts would be forced to decide these cases without the relevant facts. Nothing in the statute remotely suggests that Congress intended such illogical, unfair and unprecedented results.

II. Inaccuracies in respondent's brief.

Respondent's brief contains numerous factual inaccuracies and misleading statements that will be apparent by comparison to the documented Statement of the Case in the Brief for Petitioner. It would trespass on the

Court's time to rehash all the facts. Petitioner therefore limits this aspect of his reply brief to two matters – one relating to his efforts to develop the evidence supporting his federal constitutional claims in state court, the other relating to the critical significance at petitioner's trial of the credibility battle between petitioner and Jeffrey Cruse.

Respondent argues that "[b]ecause the state court appointed . . . [petitioner] an attorney who clearly could have discovered the basis for the claims [involving Juror Stinnett] with the exercise of due diligence, a finding of 'cause' or 'due diligence' cannot be premised upon the state court's denial of . . . [petitioner's] conclusory request for an investigator." Resp. Br. 26. Respondent's criticism of state habeas counsel, Eric White, for not having single-handedly located and interviewed petitioner's jurors denies the reality of state habeas practice in Virginia. As noted at page 12 of petitioner's brief, the Virginia Supreme Court's denial of White's request for investigative services coincided with its denial of petitioner's application for state habeas relief. Thus, by the time White learned that he would receive no investigative assistance from the state courts, it was too late to conduct his own investigation because relief had already been denied.[7]

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[7] Nor should White be faulted for not anticipating the Virginia Supreme Court's simultaneous denial of his request for an investigator and his petition for habeas relief. In a contemporary case, the Virginia Supreme Court's denial of a request for expert services preceded its denial of habeas corpus relief by nearly five months. *See Cardwell v. Greene*, 152 F.3d 331, 335 (4th Cir. 1998) (recounting procedural history of Cardwell's

Furthermore, respondent's contention that White could easily have interviewed the jurors and presented the evidence he gathered is disingenuous. Had White done so, he would have been required to submit his own affidavit as counsel for petitioner attesting to what he had learned. In other Virginia capital habeas cases, however, Mr. Curry, counsel for the respondent in this case, has vigorously opposed the submission of affidavits by counsel for the petitioner as "manifestly improper." *Walton v. Taylor*, Record No. 990305 (Va.S.Ct.) (Warden's Opposition to Motion to Depose Dr. Ryans at 2, Sept. 20, 1999). Respondent's brief offers no explanation as to why an affidavit from White recounting the substance of his conversations with the jurors would have been any more acceptable than affidavits by counsel in other cases.

Respondent also relies heavily upon what it terms petitioner's "highly inculpatory testimony" in an effort to diffuse the prejudice petitioner suffered as a result of the Commonwealth's nondisclosure of Cruse's psychiatric report and its failure to reveal Cruse's testimonial deal with the prosecution. Resp. Br. at 37; *see also id.* at 10, 49.[8]

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case). Furthermore, like Cardwell, petitioner was among the very first death-sentenced prisoners to seek state habeas corpus relief under the Virginia scheme that became effective July 1, 1995. *See* Brief of *Amici* VCCDA & VTLA at 7, n.5.

[8] Respondent repeatedly asserts that both Cruse and petitioner testified that the initial shot fired by petitioner struck Mr. Keller in the head. *See* Resp. Br. 1, 2-3 & n.4, 10 n.8, 49. This is simply not true. While footnote 27 of petitioner's brief explains how the testimony *suggests* that the shot petitioner fired struck Mr. Keller in the head, the record is clear that neither Cruse nor petitioner actually testified that it did. What is known is that Mr. Keller was shot five times, that he stood up

As the record clearly reveals, however, petitioner admitted to firing only one shot which, in light of the undisputed circumstantial evidence, was likely the shot that passed through Mr. Keller's face. *See* Pet. Br. 41-42. While respondent and petitioner obviously disagree about whether the medical examiner's testimony should be read as indicating that the wound caused by that shot "was not likely fatal in and of itself," Resp. Br. 10, n.8 *quoting* Pet. Br. 6, respondent's treatment of the subject dodges a more basic and important point: the medical examiner's testimony *did not answer the question whether the shot petitioner admitted firing "caused the victim's death,"* JA 293 (Instruction No. 18 given to petitioner's jury). When asked "about the lethal effect of that wound not entering the brain," the medical examiner answered equivocally that "[s]ince we had other wounds you really cannot evaluate what individual damage that bullet would have done to the skull or the brain." JA 178. When pressed further by the prosecutor as to whether it would "be fair to say that [this wound] contributed to the death of Morris Keller" the medical examiner said "Yes," but subsequently revealed that, in her view, "any gunshot wound, even if it might not be lethal, in and of itself is contributory." JA 179; 181.

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after the first shot which was fired by petitioner, and that two of the five shots passed through his brain, while the other three resulted in wounds to less vital areas. It is thus possible, as discussed in petitioner's brief, that petitioner's shot struck Mr. Keller in the head, but it is also possible that this shot resulted in one of the leg wounds sustained by Mr. Keller. Either way the jury could not convict petitioner of capital murder unless it determined that the wound caused by his shot was fatal.

Contrary to respondent's suggestion, a wound determined to have been "contributory" under the medical examiner's definition of that term is simply not the equivalent of a wound that must, beyond a reasonable doubt, have "caused the victim's death." JA 293.[9] This was the central, decisive issue at trial for both the prosecution and the defense, as evidenced by both sides' focus on it in their summations.[10]

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[9] Respondent's reliance on *Strickler v. Greene*, 119 S.Ct. 1936 (1999), in this connection is misplaced. The underlying murder in *Strickler* was accomplished using a 69 pound boulder whose "weight and dimensions made it apparent that a single person could not have lifted it and dropped or thrown it while simultaneously holding the victim down." *Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991). These undeniably unique facts are reflected in the Virginia Supreme Court's approval of the Commonwealth's joint-perpetrator theory in that case: "where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes." *Id., quoting Coppola v. Commonwealth*, 257 S.E.2d 797, 806 (1979), *cert. denied*, 444 U.S. 1103 (1980) (defendant who "jointly participated in [a] fatal beating" subject to prosecution for capital murder). Here, however, it would have been entirely possible for petitioner's jury to have remained unconvinced that petitioner's infliction of *a* wound was sufficient to find that he had "take[n] a direct part in inflicting fatal injuries." *Strickler*, 404 S.E.2d at 235.

[10] *See* JA 282 (the prosecutor: "The only dispute is about the rape and whether . . . [Michael Williams] is guilty of first degree murder or capital murder"); JA 280 (defense counsel: "our theory is . . . that Mr. Cruse fired all three shots that killed Mrs. Keller. . . . And . . . based upon the evidence that you see, when Mr. Keller stood up, that the wound that . . . [the medical examiner] said was possibly non-lethal . . . was the one that . . . Mr. Williams fired from the .38. . . . "); JA 280 (defense counsel: "And I submit to you that Mr. Cruse is lying. . . . ¶ Now I'm not suggesting to you that Mr. Williams is not guilty, that because of my scenario he walks, he gets off of murder. He's guilty of first degree [noncapital] murder on both counts").

The medical examiner's testimony merely highlighted the uncertainty inherent in any attempt to determine whether the wound petitioner probably inflicted was fatal. It did not render the jury's ultimate resolution of that question a foregone conclusion and it does not refute a reasonable probability that the result of petitioner's trial would have been different but for the Commonwealth's failure to disclose the evidence undermining Cruse's credibility.

CONCLUSION

For these additional reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

*Barbara L. Hartung
1001 E. Main St.,
Suite 504
Richmond, VA 23219
(804) 649-1088

John H. Blume
Keir M. Weyble
1247 Sumter St.,
Suite 202
Columbia, SC 29201
(803) 765-1044

James E. Moore
Christian & Barton, L.L.P.
909 E. Main St.,
Suite 1200
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner

**Counsel of Record*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

—v.—

JOHN B. TAYLOR, Warden,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA IN SUPPORT OF PETITIONER

Larry W. Yackle
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

No. 99-6615

IN THE
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OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

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-v.-

JOHN B. TAYLOR,
Warden,

Respondent.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

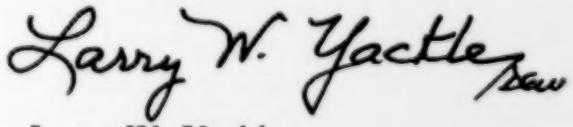
Pursuant to Rule 37.2(b), the American Civil Liberties Union (ACLU) and the ACLU of Virginia respectfully move this Court for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has granted consent, but respondent has refused to consent.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia is its statewide affiliate. In support of those principles, the ACLU has appeared before this Court on numerous oc-

casions, both as direct counsel and as *amicus curiae*.

This case involves the potential execution of a person who contends that he was convicted in state court in violation of the Sixth and Fourteenth Amendments and that, in turn, he was denied proper consideration of his claims in federal habeas corpus proceedings. Because this case raises issues of fundamental importance to the ACLU and its members, we respectfully seek leave to file the attached brief *amicus curiae*, which focuses on the circuit court's interpretation of 28 U.S.C. §2254(e)(2).

Respectfully submitted,



Larry W. Yackle
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Dated: December 14, 1999

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INTEREST OF *AMICI* [1]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

STATEMENT OF THE CASE

The petitioner, Michael Wayne Williams, was convicted of murder and sentenced to death in Virginia. After his conviction was affirmed on direct review, Mr. Williams sought postconviction relief in state court. In that context, he alleged that the prosecution had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that it had promised a key witness, Jeffrey Alan Cruse, that it would not seek the death penalty in his case if he gave evidence against Mr. Williams. Mr. Williams moved the state court for discovery, expert assistance, investigative funds, and an evidentiary hearing to complete the factual record. In particular, he asked for any *Brady* materials in the state's possession that might have been helpful to the defense. He asked for psychological reports that might have been used at trial to undermine the credibility of Mr. Cruse as a prosecution witness. And he asked the state court to appoint an investigator to explore irregularities in the way the jury had been selected. Each of Mr. Williams' motions was opposed by the state and denied by the state courts, which ultimately denied all postconviction relief as well.

In subsequent habeas corpus proceedings in federal district court, Mr. Williams advanced both the claim that had been rejected in state court and two additional claims. One was a different *Brady* claim that the state had failed to dis-

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

close a psychiatric report showing that Mr. Cruse was unreliable. The other claim was that a juror, Bonnie Stinnett, had given misleading answers to questions on *voir dire* and that the prosecutor, Robert Woodson, had failed to set the record straight. Ms. Stinnett denied that she was related to any of the potential witnesses when, in fact, she had previously been married to Deputy Sheriff Claude Meinhard. She also denied that she had ever been represented by any of the attorneys in the case when, in fact, Mr. Woodson had handled her divorce from Mr. Meinhard. The record showed that Mr. Woodson heard Ms. Stinnett make those misleading statements but did nothing to correct the misconceptions they created.

Initially, the district court determined that an evidentiary hearing should be conducted to develop the facts. The state asked the circuit court for an emergency stay of the order for a federal hearing. The circuit court directed the district court to reconsider the question whether a hearing should be held in light of 28 U.S.C. §2254(e)(2).[2] The district court, in turn, offered the view that §2254(e)(2) was inapplicable because it was not Mr. Williams' fault, but the state's fault, that the facts relevant to his federal claims were not developed in state court. Nevertheless, the district court understood that the circuit court had directed that §2254(e)(2) should be applied. Proceeding on that basis, the district court concluded that a hearing was foreclosed because Mr. Williams could not satisfy §2254(e)(2)(B).

On appeal, the circuit court made explicit what had been implicit in its previous remand order by holding that §2254(e)(2) applies to this case and that it precludes a federal evidentiary hearing to develop the facts underlying Mr. Williams' claims. Mr. Williams applied for a writ of *certiorari*, and this Court granted review with respect to one question:

> Whether 28 U.S.C. sec. 2254(e)(2), which prohibits a federal habeas court from holding an evidentiary hearing only "if the applicant has failed to develop the factual basis of a claim in State court proceedings," governs petitioner's claims where throughout state proceedings, the state suppressed the relevant facts, denied petitioner's discovery requests, denied all investigative and expert resources to investigate, develop, and discover claims, and denied an evidentiary hearing.

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[2] Section 2254(e)(2) was enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No. 104-132 (1996). The relevant portion of the statute provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
>
> (A) the claim relies on --
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(continued...)

[2] (...continued)

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

SUMMARY OF ARGUMENT

This Court granted review to decide a two-part question of statutory construction: "Whether 28 U.S.C. §2254(e)(2) . . . governs petitioner's claims" in the circumstances of this case. Initially, the Court must identify the conditions that make §2254(e)(2) applicable in any case. Thereafter, the Court must decide whether those conditions are satisfied in this instance.

The circuit court below erroneously construed §2254(e)(2) to hold prisoners strictly liable for inadequate fact-finding in state court, even when the state is responsible for the inadequate record. That construction defies §2254(e)(2)'s text, its purpose, and its relationship to prior law.

To begin with, the circuit court's construction of §2254(e)(2) is inconsistent with the plain language of the statute itself. As Congress explained in the introductory clause of §2254(e)(2), the general prohibition on federal hearings is triggered "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." On its face, therefore, the general rule against federal hearings applies only if it was the *prisoner* who failed to develop the facts in state court and does not apply if it was the *state* that failed to do so. Accordingly, the general prohibition does not apply to this case, in which state officials kept Mr. Williams from discovering and developing the factual basis of his federal claims.

The new statute divides the cases that can arise into four categories: (1) cases in which the state rather than the prisoner failed to develop the facts; (2) cases in which the prisoner failed to develop the facts and might have done so by exercising diligence; (3) cases in which the prisoner failed to develop the facts regarding a novel claim; and (4) cases in which the prisoner failed to develop the facts re-

garding a previously recognized claim even though he or she exercised diligence. In cases in the first category, the general rule against federal hearings is inapplicable. In cases in the second category, that rule is applicable and decisive. In cases in the third and fourth categories, the general rule applies, but it is not decisive because an exception to it may be warranted.

The circuit court acknowledged Mr. Williams' argument that this case falls in the first category because it was the state's fault that the facts related to his claims were not developed. Unlike every other circuit court to consider the issue, however, the court below held that the state's failure to provide Mr. Williams with relevant evidence did not prevent the state from relying on the inadequacy of the record to defeat his claim to a federal hearing. The circuit court did not appreciate that the state's responsibility for inadequate state fact-finding makes the general rule against federal hearings inapplicable. To the contrary, the circuit court held that a federal hearing is foreclosed in this case because Mr. Williams failed to overcome the state's interference with his attempts to develop the facts.

The circuit court's strict liability construction defeats the purpose of §2254(e)(2), which is to encourage the parties to litigate effectively in state court. It penalizes the prisoner for the state's default and, concomitantly, rewards the state for mishandling the fact-finding function. The circuit court's construction also neglects the large extent to which §2254(e)(2) embodies a central idea in this Court's previous decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). This new statute requires a prisoner to give the state an opportunity to provide its own fact-finding machinery. It does not require the prisoner to surmount the obstacles that the state erects to thwart the prisoner's efforts.

ARGUMENT

I. THE CIRCUIT COURT'S STRICT LIABILITY CONSTRUCTION OF §2254(e)(2) CONFLICTS WITH THE TEXT OF THE NEW STATUTE

The circuit court below construed §2254(e)(2) to apply to this case, even though it was the state's fault that the facts supporting Mr. Williams' claims were not developed in state court. That is what Judge Easterbrook has described (and condemned) as a "strict liability" interpretation because it visits a penalty on the *prisoner* regarding inadequate state fact-finding for which the *state* was responsible.[3] The strict liability construction is flatly inconsistent with the text of the new statute.[4]

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[3] *Burris v. Parke*, 116 F.3d 256, 259 (7th Cir.), *cert. denied*, 118 S.Ct. 462 (1997). The President, too, disclaimed the strict liability construction even as he signed the new statute into law. Specifically, he said that "[§2254(e)] applies to situations in which 'the applicant has failed to develop the factual basis' of his or her claim. Therefore, [§2254(e)] is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court." Statement of the President, 1996 U.S. Code & Admin. News 961-1, at 961-63.

[4] The district court took the view that the general rule against federal hearings established by §2254(e)(2) should not apply in this case because Mr. Williams made "numerous attempts to obtain the evidence required to discover" his claims, but his efforts were "repeatedly rebuffed." *Williams v. Netherland*, 6 F.Supp.2d 545, 547 (E.D.Va. 1998). As the district court explained, the state frustrated Mr. Williams' attempts to develop the facts "by denying all of [his] requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record." *Id.* Nevertheless, the district court found itself compelled to apply the general prohibition on federal hearings, because the circuit court had "directed" that §2254(e)(2) must be applied without regard to the reasons why the facts were not developed in state court. *Id.* On appeal, the circuit court reaf-

(continued...)

Section 2254(e)(2) itself prescribes the conditions for its applicability. The general prohibition on federal hearings applies "[i]f *the applicant* has *failed* to develop the factual basis of a claim in State court proceedings." 28 U.S.C. §2254(e)(2)(emphasis added). As Judge Easterbrook has explained: "'Failure' implies omission -- a decision not to introduce evidence when there was an opportunity, or a decision not to seek an opportunity."[5]

Every other circuit court that has considered the question has held that the "applicant" did not "fail" to develop facts if it was the state that "failed" to do so.[6] As those courts have uniformly recognized, the general prohibition on federal hearings established by §2254(e)(2) is inapplicable to a case in which it was the state's fault that the facts were not developed in state court.[7]

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[4] (...continued)
firmed its strict liability construction by holding Mr. Williams accountable for failing to develop the facts, notwithstanding the hurdles the state placed in his path. *See Williams v. Taylor*, 189 F.3d 421, 426-27 (4th Cir. 1999).

[5] *Burris v. Parke*, 116 F.3d at 258.

[6] *Burris v. Parke*, 116 F.3d at 258-59; *Jones v. Wood*, 114 F.3d 1002, 1012-13 (9th Cir. 1997); *Love v. Morton*, 112 F.3d 131, 136 (3d Cir. 1997); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998).

[7] The state insists that the cases cited in n.6 are distinguishable, because the prisoners in those cases raised relevant claims in state court and then were denied an opportunity to develop the facts related to those claims. Here, by contrast, the state complains that Mr. Williams failed to advance claims at all in state court (albeit for the reason that state officials kept him from discovering the existence of those claims). Respondent's Brief in Opposition to Petition for *Certiorari*, at 11 n.8. That argument draws a distinction without a difference. Nothing in §2254(e)(2) turns on whether a substantive claim was advanced in state court. All that

(continued...)

Against this background, the circuit court decision below stands out as a startling exception. The strict liability construction of §2254(e)(2) unaccountably ignores the express textual condition that the "applicant" must have "failed" to develop the facts. By the circuit court's account, that language carries no meaning at all, and §2254(e)(2) must be read as though it were not there. That will not do. Whenever possible, statutory terms must be given operative effect according to their "ordinary, contemporary, common meaning."[8]

The interpretation that other circuits have placed on the new statute tracks its general plan. Section 2254(e)(2) divides the field into four kinds of cases: (1) cases in which the state rather than the prisoner failed to develop the facts in state court; (2) cases in which the prisoner failed to develop the facts and might have done so by exercising diligence; (3) cases in which the prisoner failed to develop the facts regarding a novel claim; and (4) cases in which the prisoner failed to develop the facts regarding a previously recognized claim despite the exercise of diligence. In cases of the first kind, the general rule against federal hearings is

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[7] (...continued)
matters is whether the facts related to a claim were developed and, if they were not, whether it was the prisoner's fault or the state's fault. Moreover, the state's argument, if accepted, would generate a silly result. In the cases cited, other circuits faulted state officials and state courts for frustrating prisoners' attempts to develop the facts underlying known claims. By the state's account here, those state officials and courts would have been successful in depriving prisoners of federal hearings if they had kept prisoners from discovering substantive claims in the first place.

[8] *Walters v. Metro. Educ. Enterprises*, 519 U.S. 202, 207 (1997), quoting *Pioneer Invest. Svc. Co. v. Brunswick Assoc.*, 507 U.S. 380, 388 (1993).

inapplicable.[9] In cases of the second kind, the general prohibition is applicable and bars a federal evidentiary hearing. In cases of the third and fourth kinds, the general prohibition is applicable, but a federal hearing is still permitted if the facts tend to establish the prisoner's innocence.[10]

These four categories are sensible. If the state kept the prisoner from developing the facts, it makes sense that the general prohibition on federal hearings established by §2254(e)(2) should not apply. If the state did not prevent the prisoner from developing the facts and it was the prisoner's own fault that the facts did not come out, it makes sense that the general prohibition should operate. But then,

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[9] Congress has never enacted affirmative statutory standards prescribing the circumstances in which federal habeas courts must or should conduct evidentiary hearings. Instead, Congress has been content with the standards that this Court has established. *See, e.g., Blackledge v. Allison*, 431 U.S. 63 (1977); *Townsend v. Sain*, 372 U.S. 293 (1963). Those standards continue to govern cases in which §2254(e)(2) does not bar a federal hearing.

[10] Subparagraph (A)(i) provides for an exception with respect to facts related to novel claims. Subparagraph (A)(ii) provides for an exception with respect to facts related to conventional claims when those facts were not discoverable by the exercise of diligence. Subparagraph (B) prescribes the extent to which the facts must relate to innocence, if an exception under either subparagraph (A)(i) or subparagraph (A)(ii) is warranted. The requirements established by subparagraph (B) are more demanding than anything this Court has thought to be warranted to avoid a forfeiture because of default -- in this or any context. *Cf. Schlup v. Delo*, 513 U.S. 298 (1995)(adopting a less demanding rule for successive petition cases in which prisoners have already had one opportunity to litigate in federal court). In some instances, the combination of subparagraphs (A) and (B) may raise constitutional questions. Those provisions appear to bar a federal hearing if the facts could have been discovered earlier no matter *how* clear it is that the prisoner is actually innocent; they also bar a federal hearing even if the facts could not have been discovered earlier unless the prisoner ties those facts to innocence in an extremely strong way.

in some circumstances, it also makes sense to allow exceptions to the general rule, especially if the facts in issue demonstrate that the prisoner may well be innocent. Accordingly, it makes sense to permit an exception if the prisoner failed to develop the facts regarding a novel claim that the federal court can enforce retroactively. It equally makes sense to allow an exception if the prisoner was unable to develop the facts regarding a more conventional claim even though he or she exercised diligence.

By contrast, the circuit court's strict liability interpretation attributes to Congress a blind intention to establish a general rule against federal hearings that comes into play even when the state was responsible for flawed state proceedings. That interpretation does a disservice to the legislative branch. It is especially objectionable here, where another perfectly sensible construction is available. As this Court has observed, a statute's terms should ordinarily be read "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law . . . [in order to] make sense rather than nonsense out of the *corpus juris*."[11]

Initially, the circuit court acknowledged Mr. Williams' argument that this case fits the first category. At that point in its opinion, the circuit court appeared to recognize that §2254(e)(2) does not saddle prisoners with strict liability and that when inadequate state fact-finding is ascribable to the state, the general rule against federal hearings is not triggered.[12] Yet, as the circuit court proceeded, it nonetheless

[11] *West Va. Univ. Hosp. v. Casey*, 499 U.S. 83, 100-01 (1991).

[12] The court cited *Cardwell v. Greene*, 152 F.3d 331 (4th Cir.), *cert. denied*, 119 S.Ct. 587 (1998), in which another panel of the Fourth Circuit had previously adopted the interpretation that other circuits have placed on §2254(e)(2). Yet, the court failed to appreciate the implications of *Greene's* rejection of the strict liability construction.

blamed Mr. Williams for the state's defaults in this case and thus employed the strict liability construction in fact, if not in name.

The circuit court fundamentally misunderstood the role that a prisoner's efforts play in determining whether the state was at fault for inadequate state fact-finding. Other circuits have explained that the state cannot be said to have failed to develop the facts if the prisoner did not "diligently" pursue avenues for state court litigation.[13] The point is unremarkable: State authorities cannot be faulted for refusing to grant a prisoner investigative help, discovery, or a hearing, if the prisoner did not ask for those things. Only the circuit court below has held, however, that the prisoner can be faulted for not uncovering facts that the state concealed.[14]

If this case had arisen in another circuit, the first order of business would have been to decide whether it was the state's fault that the facts were not developed in state court. To make that determination, it would have been entirely reasonable to inquire whether Mr. Williams properly asked for the state's aid in developing the facts or whether the state improperly withheld relevant facts in its possession. In this case, by contrast, the circuit court proceeded in an entirely different way. It implicitly recognized that the state inter-

[13] *See* cases cited in n.6, *supra*.

[14] It can be confusing to use the term "diligence" to describe a prisoner's threshold duty to give the state a chance to determine the facts. Subparagraph (A)(ii) uses that same "diligence" term to describe an exception to the general prohibition on federal hearings -- an exception that can come into play only if a federal court first determines that it was the prisoner's fault, not the state's, that the facts were not developed earlier. Yet, the substance of the point is noncontroversial: Under the new statute, a federal court will hold the prisoner responsible for failing to develop the facts if the prisoner did not invoke the state's fact-finding machinery.

fered with Mr. Williams' efforts to discover and develop the facts, but then condemned Mr. Williams for *failing to overcome the state's interference*.

By the circuit court's account, Mr. Williams should not have relied on the state to tell him about the psychological report on Mr. Cruse. Instead, he should have suspected that a report of that kind existed but had not been placed in the official file. By the circuit court's account, Mr. Williams should not have relied on Ms. Stinnett to tell the whole truth in answering questions on *voir dire*. Instead, he should have suspected that she was providing something less than the whole truth and should have attempted to verify her story by independent investigation. And by the circuit court's account, Mr. Williams should not have relied on the prosecutor to correct any misunderstanding of which he was aware. Instead, Mr. Williams should have suspected that Mr. Woodson was sitting silent in the court room, knowing that Ms. Stinnett was omitting critical facts from her answers.

By making those demands of Mr. Williams, the circuit court missed the point of the threshold inquiry into whether Mr. Williams or the state was at fault for inadequate state fact-finding.[15] State-created obstacles are not to be confused with ordinary difficulties that litigants face when they investigate the factual basis for legal claims (*e.g.*, elusive or uncooperative private witnesses, faded memories, etc.). State-created obstacles are qualitatively distinct; they make the state, rather than the prisoner, responsible. *Strickler v. Greene*, 527 U.S. __, 119 S.Ct. 1936, 1949 n.23 (1999)(explaining that a prisoner could not be faulted for lack of "diligence" if he relied on the state's official file to contain all *Brady* materials the state was obligated to disclose). Under §2254(e)(2), the prisoner is not charged with the obligation to fight through state impediments to developing the facts. If the state interferes with the prisoner's fact-finding efforts, the general statutory rule against federal hearings is inapplicable.[16]

[15] The state was manifestly responsible for its failure to provide Mr. Williams with the report on Mr. Cruse and for Mr. Woodson's failure to correct Ms. Stinnett. *See Amadeo v. Zant*, 486 U.S. 214 (1988)(finding "cause" where state officials had concealed materials that would have alerted the defense to a constitutional claim).

By refusing to give state interference the effect the statute requires, the circuit court below reached the erroneous decision that this case does not fit the first category. Accordingly, the circuit court erroneously decided that the general rule against federal hearings applies. Proceeding on that erroneous premise, the circuit court reached the further erroneous conclusion that this is an ordinary second-category case in which a federal hearing is foreclosed.

The circuit court did pause to consider whether this case might fit the fourth category, governed by subparagraph (A)(ii). But at that point, the circuit court only compounded its previous errors. In cases properly governed by subparagraph (A)(ii), a prisoner may obtain an exception to the general rule by showing that he or she exercised diligence but that the facts were still not discoverable earlier. The circuit court thus asked whether Mr. Williams might have turned up the facts relating to his claims if he had been more diligent. In so doing, however, the circuit court again errone-

[16] This does not mean that prisoners can routinely shift the blame for inadequate fact-finding to the state by filing boilerplate motions for discovery and hearings, devoid of any attempt to identify the facts they wish to develop. It does mean, however, that if the state prevents a prisoner from discovering legal claims or facts that support those claims, the prisoner is not accountable under §2254(e)(2) for the flawed state fact-finding that ensues. In this case, Mr. Williams did not file blunderbuss motions in order to be in a position to fault the state for failing to develop the facts. He did what he could, but was "repeatedly rebuffed" by state authorities. *Williams v. Netherland*, 6 F.Supp.2d at 547.

ously faulted Mr. Williams for not overcoming the obstacles the state put in his way.

Even in fourth-category cases governed by subparagraph (A)(ii), the diligence that a prisoner must demonstrate does not extend to surmounting state interference. If it did, it could not be reconciled with §2254(e)(2)'s threshold provision making the general rule against federal hearings inapplicable where the state was at fault. It would scarcely make sense for this new statute to provide that a prisoner can obtain an exception to the general rule only by defeating conditions that make that rule inapplicable in the first place.

In this case, the district court found that Mr. Williams did what he could to engage state fact-finding machinery, but that the state refused to cooperate. This, then, is a case that fits the first category recognized by §2254(e)(2) -- that is, a case in which it was the state's fault that the facts were not developed in state court. The general prohibition on federal hearings established by §2254(e)(2) is therefore inapplicable.

II. THE STRICT LIABILITY CONSTRUCTION CONFLICTS WITH THE PURPOSE OF THE NEW STATUTE

The strict liability construction of §2254(e)(2) cannot be reconciled with the statute's purpose to encourage effective litigation in state court. Section 2254(e)(2) is a procedural default rule. It imposes a penalty on the party responsible for inadequate state fact-finding.

By allowing federal hearings where the state was responsible for inadequate state fact-finding, the statute encourages the states to discharge their duty to perform the basic fact-finding function in the first instance. By generally prohibiting federal hearings where the prisoner was at fault, the statute encourages prisoners to take advantage of

the opportunities for state litigation made available to them. And, by allowing federal hearings where the facts could not have been discovered despite the prisoner's diligence, the statute ensures that prisoners who may actually be innocent are not deprived of effective federal adjudication.

The circuit court's strict liability construction defeats §2254(e)(2)'s incentive structure. It pays no attention to *why* the facts were not developed in state court and thus distributes burdens and benefits in a way that is, at best, arbitrary and, at worst, perverse. The strict liability interpretation dispenses burdens arbitrarily inasmuch as it penalizes the prisoner for shortcomings in the record for which the state was responsible. It dispenses benefits perversely inasmuch as it allows a state to "insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts."[17]

There is little hard evidence regarding the meaning that Congress expected this Court to place on the various provisions in AEDPA. Yet, it is widely recognized that the general, overarching purpose was to ensure that federal habeas corpus does not unduly interfere with the adjudication of federal claims in state court. The working idea was that the states ordinarily do an acceptable job of enforcing federal rights. Or, at least, that the states are willing to enforce federal rights, if given the opportunity to do so. That premise holds only if the states discharge the responsibilities that Congress thinks they should have. It is therefore untenable to read §2254(e)(2), or any other provision in AEDPA, to invite the states to shirk their responsibilities and *still* deny prisoners an opportunity for effective adjudication in federal court.

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[17] *Burris v. Parke*, 116 F.3d at 259 (explaining that "[n]othing in §2254(e) or the rest of AEDPA implies that states may manipulate things in this manner").

III. THE STRICT LIABILITY CONSTRUCTION IGNORES THE EXTENT TO WHICH THE NEW STATUTE INCORPORATES PRIOR DOCTRINE

The circuit court below overlooked the extent to which §2254(e)(2) borrows from the body of pre-existing doctrine established by this Court. When a statute employs terms that have "accumulated settled meaning," it should be inferred that the statute "means to incorporate" that established meaning.[18] Concomitantly, when a statute adopts terms from an existing body of learning, it should be inferred that it adopts the "cluster of ideas" that were attached to those terms in the context from which they were taken.[19] In this instance, §2254(e)(2) employs essentially the same terms that this Court used in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, to codify an idea that was central to the procedural default rule that the Court established in that case -- namely, the idea that prisoners should not be held accountable for state interference with fact-finding in state court.

In *Tamayo-Reyes*, this Court recognized that, in some instances, the facts underlying federal claims were not developed in state court because prisoners "*negligently failed* to take advantage of opportunities in state-court proceedings." *Id.* at 9 (emphasis added). The Court held that a prisoner's "[negligent] *failure to develop the facts* in state-court proceedings" precluded a federal evidentiary hearing, unless the prisoner either showed "cause" and "prejudice," or demonstrated that the state court's failure to conduct a hearing probably resulted in the conviction of an innocent

[18] *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

[19] *Molzof v. United States*, 502 U.S. 301, 307 (1992), quoting *Morrisette v. United States*, 453 U.S. 322, 329 (1981).

person. *Id.* at 11-12 (emphasis added).[20] A prisoner could establish "cause," in turn, by showing that "*interference by state officials*" prevented the development of the facts. *Id.* at n.5, quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (emphasis added).[21]

Section 2254(e)(2), enacted only four years after *Tamayo-Reyes*, employs similar language to capture a similar idea. In *Tamayo-Reyes*, the Court penalized the prisoner only if he or she "negligently failed" to develop the facts in state court. Obviously, a prisoner could not be charged with negligence if the state itself was at fault. Accordingly, under *Tamayo-Reyes*, a prisoner who showed state interference with state fact-finding could not be denied a federal hearing.

Similarly, §2254(e)(2) triggers a general statutory rule against federal hearings only if the "applicant . . . failed to develop the factual basis of a claim." In light of *Tamayo-Reyes*, that reference to a prisoner's failure can only be read to mean a negligent, blameworthy default on the prisoner's part. Accordingly, under the new statute, as under *Tamayo-Reyes*, a prisoner is not to be denied a federal hearing if the state frustrated his or her attempts to develop the facts in state court.

[20] To be precise, the court explained that a prisoner could obtain a federal hearing by showing either "cause" and "prejudice" or that the denial of a hearing would work a "miscarriage of justice." *Id.* According to the case law, a prisoner can demonstrate a "miscarriage of justice" by showing that a violation of federal law "probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

[21] *See also Coleman v. Thompson*, 501 U.S. 722, 754 (1991)(explaining that mistakes by counsel in state court can count as "cause" if they rose to the level of ineffective assistance in the constitutional sense -- a matter for which the state is responsible).

Although *Tamayo-Reyes* treated the state's responsibility for flawed state fact-finding as "cause" for allowing a federal hearing notwithstanding a prisoner's negligent failure to develop the facts, it does not follow that the new statute operates in the same way. By contrast, it is far more sensible to read §2254(e)(2) to fold its treatment of state responsibility into the baseline condition for invoking the general rule against federal hearings in the first instance: If it was the state's fault that the facts were not developed, the general rule is not triggered.

Certainly, it cannot be true that §2254(e)(2) initially holds the prisoner strictly liable for inadequate fact-finding, mindlessly triggers a general rule against federal hearings irrespective of why the facts were not developed in state court, and then attends to state interference only as an exception to that general statutory rule. If that *were* true, then every case involving flawed state fact-finding would be governed by the provisions in subparagraphs (A) and (B). And no prisoner would be able to obtain a federal evidentiary hearing without proving his or her actual innocence in an extremely strong way.

That result would depart fundamentally from the framework this Court adopted in *Tamayo-Reyes*. In that case, the Court explained that a federal hearing could be held where the prisoner showed "cause" and "prejudice," without independently demonstrating probable innocence. 504 U.S. at 11-12. Equally, the Court explained that a prisoner who established probable innocence could obtain a hearing without showing "cause." *Id.* It is inconceivable, then, that §2254(e)(2) simply bars all federal evidentiary hearings irrespective of what happened in state court, unless prisoners

make a showing that goes well beyond probable innocence.[22]

Both *Tamayo-Reyes* and the new statute make state responsibility for inadequate fact-finding a crucial element of the analysis. By contrast, the circuit court's strict liability construction of §2254(e)(2) makes nothing of state responsibility at all. It treats the new statute as a radical departure from *Tamayo-Reyes* and permits the state to frustrate fact-finding in state court and then to insist that the prisoner should have managed to surmount the state's interference. No principles of statutory construction warrant that untenable construction of this new statute.

---

[22] Of course, §2254(e)(2) does work prejudice and innocence into the new statutory framework. But it does so when, and only when, the prisoner rather than the state was at fault for inadequate state fact-finding, and, accordingly, when the general rule against federal hearings is triggered. In cases of that kind, §2254(e)(2) requires the prisoner to satisfy both subparagraphs (A) and (B).

CONCLUSION

For the reasons stated above, this Court should reverse the circuit court judgment.

Respectfully submitted,

Larry W. Yackle
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF LEGAL ETHICS PROFESSORS AND THE STEIN CENTER FOR LAW AND ETHICS IN SUPPORT OF PETITIONER

LAWRENCE J. FOX*
DAVID J. KESSLER
VIKTORIYA MEYEROV
Drinker Biddle & Reath LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
(215)988-2700
* *Counsel of Record*
Counsel for Amici Curiae

PACKARD PRESS / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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No. 99-6615

IN THE
Supreme Court of the United States
October Term, 1999

MICHAEL WAYNE WILLIAMS,

Petitioners,

v.

JOHN B. TAYLOR, WARDEN,

Respondents.

On Writ of *Certiorari*
To The United States Court of Appeals
For The Fourth Circuit

MOTION OF LEGAL ETHICS PROFESSORS AND THE STEIN CENTER FOR LAW AND ETHICS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3(b), movants Kathleen Clark, Stephen Gillers, Bruce Green, Geoffrey Hazard, Susan Martyn, James Moliterno, Deborah Rhode, Ronald Rotunda, Charles W. Wolfram and Fordham University's Louis Stein Center for Law and Ethics respectfully request leave to file the attached brief *amicus curiae* in support of petitioner. Movants have sought consent to their appearance as *amici curiae* from Petitioner Michael Williams and Respondent John Taylor, Warden of the Sussex I State Prison. Although Petitioner has consented, Respondent has not consented.

Movants are nine law professors who are experts in legal ethics, and a university ethics center. Kathleen Clark, Professor at Washington University School of Law, has taught legal ethics since 1993. Stephen Gillers, Professor at New York University School of Law, has taught legal ethics since 1978, and is the author of a casebook, REGULATION OF LAWYERS (5th ed. 1998). Bruce Green, Stein Professor at Fordham University School of Law and Director of the Louis Stein Center for Ethics, has taught legal ethics since 1987.

Geoffrey Hazard, Trustee Professor at the University of Pennsylvania School of Law, has taught legal ethics since 1966, was the reporter for the Kutak Commission that created the ABA's MODEL RULES OF PROFESSIONAL CONDUCT, and is the co-author of a treatise, THE LAW OF LAWYERING, and a casebook, THE LAW AND ETHICS OF LAWYERING (3rd ed. 1999). Susan Martyn, Professor at University of Toledo College of Law, has taught legal ethics since 1977. James Moliterno, Professor at the Marshall-Wythe School of Law at the College of William and Mary and Director of its Center for the Teaching of Legal Ethics, has taught legal ethics since 1984, and is author of CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS (1999) and ETHICS OF THE LAWYER'S WORK (1993). Deborah Rhode, Ernest W. McFarland Professor at Stanford Law School and Director of the Keck Center on Legal Ethics and the Legal Profession, has taught legal ethics since 1979, is author of the casebook, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2nd ed. 1998) and co-author of the casebook, LEGAL ETHICS (2nd ed. 1995).

Ronald Rotunda, Albert E. Jenner Jr. Professor at University of Illinois School of Law, has taught legal ethics since 1974, and is co-author of the casebook, PROFESSIONAL RESPONSIBILITY (7th ed. 2000). Charles W. Wolfram, Charles Frank Reavis Sr. Professor Emeritus at Cornell Law School, has taught legal ethics since 1974, is the author of the treatise, MODERN LEGAL ETHICS (1986), and is the reporter for the RESTATEMENT OF THE LAW GOVERNING LAWYERS' CONDUCT (1999). The Louis Stein Center for Law and Ethics, based at Fordham University School of Law, sponsors programs, develops publications, supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law faculty have examined the ethical dimensions of the administration of criminal justice, including issues of prosecutorial ethics.

The potential *Amici* have an interest in ensuring that this Court recognize the professional ethical obligation of prosecutors to disclose all exculpatory information, an obligation that is independent of prosecutors' duties under the Due Process Clause.

The brief of *Amici* will not address every point argued by the parties. Instead, *Amici* focus on a single issue: the ethical obligation of prosecutors to disclose all exculpatory information, even in post-conviction proceedings.

Based upon the above, movants respectfully request that the Court accept their attached brief for filing.

Respectfully submitted,

LAWRENCE J. FOX*
DAVID J. KESSLER
VIKTORIYA MEYEROV
Drinker Biddle & Reath LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
(215)988-2700
*Counsel of Record
Counsel for Amici Curiae

Dated: December 22, 1999

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INTEREST OF *AMICI*[1]

The interest of *Amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

STATEMENT OF THE CASE

PETITIONER'S TRIAL

Petitioner, Michael Wayne Williams, was indicted, *inter alia*, for the capital murder of Morris and Mary Keller. At Williams' trial, the uncontested facts were that on February 27, 1993, Williams and Jeffrey Alan Cruse decided to rob a house owned by Morris and Mary Keller. Mrs. Keller was sexually assaulted. Mr. and Mrs. Keller were each shot several times, and then were left for dead in a wooded area behind their home. *Williams v. Commonwealth*, 450 S.E.2d 365, 369 (Va. 1994).

The key contested issue at trial was whether it was Williams or Cruse who fired the shots that killed Mr. and Mrs. Keller. This issue was of critical importance because in Virginia, only the person who 'actually fired the fatal shot' can be guilty of capital murder. *See* VA. CODE ANN. § 18.2-31 (Michie 1994).

Cruse, who was awaiting his own trial for capital murder, testified for the Commonwealth at Williams' trial. Cruse testified that it was Williams' idea to commit the robbery; that Williams selected the Keller's home; and that Williams dictated all their actions once inside the Keller's home. Cruse also stated that he was unaware of any plan to kill the couple until moments before the first shots were fired. According to Cruse, Williams said "we'll shoot at the count of three," and then Williams shot Mr. Keller. After Williams said that he "didn't want to leave no witnesses," Cruse shot Mrs. Keller, and she "fell down." When Mr. Keller stood back up, Williams shot him again. As they were walking away, Williams shot the Kellers "a couple more times apiece."

Williams testified in his own defense. He admitted his part in the robbery, but maintained that it was Cruse who said they should murder the Kellers to eliminate witnesses. Williams said that it was Cruse who shot and killed Mrs. Keller. Williams

1. *Amici curiae* state, pursuant to SUP. CT. R. 37.6, that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

acknowledged that he shot Mr. Keller once, but said that Keller then got back up. After that, Cruse shot Keller several more times.

The jury convicted Williams on all counts, including capital murder.[2]

EXCULPATORY INFORMATION

Prior to trial, Williams' lawyer filed a *Brady* motion requesting, among other things, information regarding any "confessions or statements" made by Cruse, Joint Appendix 25 [J.A. 25] and any "psychiatric, psychological and mental health records" relating to Cruse. [St. App. 21] The trial court ordered the Commonwealth to produce any exculpatory information. [J.A. 30]

After conviction, Williams' lawyer in the state habeas proceeding wrote to Donald Curry, the Senior Assistant Attorney General in the Criminal Litigation Section, and specifically requested that Mr. Curry "review all materials and evidence in the possession, custody or control of the Commonwealth or its agents," including:

- "All psychological test [sic] or polygraph examinations performed upon any prosecution witness," and
- "A copy of all medical and psychiatric reports known to the prosecutor concerning any witness the prosecutor called at trial which arguable [sic] affected the witness's credibility, ability to perceive, or relate or recall events."

[J.A. 346-49]

Donald Curry, the Senior Assistant Attorney General in the Criminal Litigation Section, responded by stating:

> With respect to your request . . . that Warren and I "inspect and review" all materials "in the possession, custody or control of the Commonwealth" for the purpose of identifying material, exculpatory evidence, *we have no intention of doing so*. . . . This case . . . no longer is in a posture where the Commonwealth is a "prosecutor." You have filed a civil habeas corpus proceeding in which the Commonwealth is the defendant. *I know of no authority that requires the Commonwealth, as the respondent in a civil habeas proceeding, to comply with such a request from petitioner's counsel.*

[J.A. 353 (emphasis added)] Mr. Curry did not disclose any of the information requested by Williams' state habeas counsel.

Later, in the federal habeas proceeding, an investigator hired by Williams' federal habeas lawyer discovered a report of a psychiatric examination of Cruse, the key prosecution witness.[3] The psychiatric report was prepared in September of 1993, several months prior to petitioner's trial, and stated:

> [Cruse] has little recollection of [the murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time.

[J.A. 495] The report also stated Cruse was generally unable to recall events that occurred when he had been "drinking excessively" or doing drugs. [J.A. 498] This psychiatric report was not disclosed in response to either the trial court's Brady order or state habeas counsel's request.

SUMMARY OF ARGUMENT

> It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
> — *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212 (1960).

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2. Williams was convicted of capital murder, robbery, rape, and the abduction of Mary Keller; capital murder, robbery and the abduction of Morris Keller; statutory burglary, and arson. Williams contests only the capital murder convictions, not the other convictions.

3. Assistant Attorney General Donald Curry has acknowledged the significance of Cruse's testimony to the Commonwealth's case against Williams:

> The issue in this case . . . was a question of which defendant shot the victim: if the jury believed Cruse's testimony, then Williams fired all five of the shots that killed Mr. Keller and two of the three shots that killed Mrs. Keller; if the jury believed Williams' testimony, then Cruse fired all three shots that killed Mrs. Keller and all but one of the shots that killed Mr. Keller. In short, the issue in this case was credibility . . . ."

[J.A. 366-67 (citation omitted)]

Because of a prosecutor's unique position in the law — part advocate and part representative of the sovereign with an interest in seeing that justice is done — prosecutors have special ethical duties of fairness recognized in all fifty states, including the Commonwealth of Virginia.

Pursuant to the applicable provision of the Virginia ethical code, the government lawyers had a continuing duty to produce *all* exculpatory information of which they were aware both before and *after* Williams' conviction. *See* VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY (VIRGINIA CODE), DR 8-102(a). Williams, as a habeas corpus petitioner seeking relief from a capital sentence, had to be able to determine whether the Commonwealth kept exculpatory information from him in violation of his constitutional rights. This obligation to provide such information, if unfulfilled, represents an ethical violation by the Commonwealth's lawyers. Thus, this court should reverse the Appellate Court and remand this matter to the District Court for production of exculpatory information and an evidentiary hearing.

ARGUMENT

PROSECUTORS HAVE AN ETHICAL OBLIGATION TO DISCLOSE TO THE DEFENSE ALL EXCULPATORY INFORMATION, AND THAT ETHICAL OBLIGATION CONTINUES EVEN AFTER CONVICTION.

> My client's chief business is not to achieve victory but to establish justice.
>
> — Judge Simon E. Sobeloff as Solicitor General (*quoted in Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963)).

For more than a century, courts and other authorities have recognized that prosecutors have professional obligations that are distinct from, and more demanding than, those of lawyers for private clients. These obligations emerge out of the prosecutor's role unique in our system of justice. As a prosecutor, a lawyer must perform the dual role of effective advocate for his client, the sovereign, and as surrogate for that client — making many decisions that are usually left to the private client in other situations. The sovereign has an "obligation to govern impartially [that] is as compelling as its obligation to govern at all." *Berger v. U.S.*, 295 U.S. 78, 88 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212 (1960). The sovereign's "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.; see also* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4 (1940) ("Although the government technically loses its case, it has really won if justice has been done."); ABA MODEL RULES OF PROFESSIONAL CONDUCT (MODEL RULES) Rule 3.8. cmt. [1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *see generally*, Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612-18 (1999) (tracing history and development of prosecutor's obligation to see that justice is done).

It is thus well established that a prosecutor has a duty to seek justice and not simply win cases. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *Brady v. Maryland*, 373 U.S. 83, 88 (1963). In general, this duty to seek justice implies both an obligation to prevent the punishment of individuals who are innocent and an obligation to ensure that all individuals who come within the criminal justice system are accorded a fair process.

Traditionally, codes of professional conduct have identified a limited number of specific ethical obligations that are unique to prosecutors and that emerge out of the general goal to seek justice, but these codes make no attempt to define all of these obligations. *See* MODEL RULE 3.8. Other professional obligations have been identified by courts in their published opinions, by bar associations in other sets of guidelines, and by prosecutors in internal guidelines.

Of all the specific prosecutorial obligations arising out of the ethical duty to seek justice, the most firmly established is the obligation to disclose information that may help prove the innocence of an individual accused or convicted of a crime. This obligation reflects the duty both to prevent the punishment of innocent individuals *and* to accord all individuals a fair criminal process. The obligation to disclose evidence of innocence has found expression in every ABA model code of ethics beginning with the 1908 ABA CANONS OF ETHICS. But, independently of

whatever disciplinary rules may be in effect at any time, the obligation exists as an aspect of the prosecutors' role as a quasi-judicial officer.

A. Independent of Their Duties under the Due Process Clause, Prosecutors Have an Ethical Obligation to Disclose All Exculpatory Information to the Defense.

This Court has long recognized that prosecutors have an ethical obligation to disclose exculpatory information, even after conviction. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), after obtaining a death penalty in a murder case, a prosecutor discovered evidence tending to corroborate the defendant's alibi and tending to undermine the credibility of the prosecution's chief witness. *Id.* at 412. While none of the new evidence was conclusive of the defendant's innocence, the prosecutor presented this information to the Governor prior to defendant's scheduled execution date. *Id.* at 412-13. The prosecutor "explained that he wrote from a belief that 'a prosecuting attorney had a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented.'" *Id.* at 413 (quoting the brief on behalf of the prosecutor).

This Court then stated that prosecutors have:

> [a] duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial this duty is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his *office* to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility EC 7-13 . . . .

Imbler, 424 U.S. at 427 n.25 (emphasis added).

Further, the *Imbler* Court held that prosecutors are immune from liability under 42 U.S.C. § 1983 for their actions in initiating a prosecution and in presenting the State's case. In so deciding, the Court:

> emphasize[d] that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. . . . [A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.

424 U.S. at 428-29 (citing ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (MODEL CODE) EC 7-13). Thus, in providing prosecutors with immunity from civil liability, this Court explicitly recognized the importance of holding prosecutors accountable for complying with their ethical obligations.

B. The Ethical Obligation to Disclose Exculpatory Information Pre-dates this Court's Decision in *Brady v. Maryland*.

1. The ABA Has Recognized Prosecutors' Ethical Obligation to Disclose Exculpatory Information Since 1908

More than fifty years before this Court's ruling in *Brady v. Maryland*, 373 U.S. 83 (1963), the American Bar Association (ABA) recognized that prosecutors have an *ethical* obligation to disclose exculpatory information. In 1908, the ABA adopted the ABA CANONS OF ETHICS, which stated:

> The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

ABA CANONS OF ETHICS, Canon 5 (*reprinted* in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 265 (1999)).

In 1969, when the ABA replaced the CANONS OF ETHICS with the MODEL CODE, it made clear that a prosecutor's failure to disclose exculpatory information could subject the prosecutor to professional discipline.

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the

> defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

MODEL CODE DR 7-103 (B). The MODEL CODE also stated that "a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused." MODEL CODE EC 7-13. Furthermore, a "government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record . . . ." MODEL CODE EC 7-14.

In 1983, when the ABA replaced the MODEL CODE with the MODEL RULES, it again reiterated prosecutors' ethical obligation to disclose exculpatory information.

> The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . .

MODEL RULE 3.8.

Today, nearly all of the states recognize prosecutors' ethical obligation to disclose exculpatory information, and have adopted the equivalent of MODEL CODE DR 7-102 or MODEL RULE 3.8. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C.L. REV. 693, 715 n.122 (1987).

2. Virginia Imposes on Prosecutors an Ethical Obligation to Disclose Exculpatory Information

Virginia prosecutors are bound by the VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY, which states that

> A public prosecutor or a government lawyer in criminal litigation shall . . . . Make timely disclosures to counsel for the

> defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

VIRGINIA CODE DR 8-102 (A).[4] Prosecutors who fail to disclose exculpatory information can be subject to discipline. *See, e.g., Eberhart v. Virginia State Bar*, VSB No. 93-031-1042 (Nov. 22, 1994) (imposing 18-month suspension on prosecutor who withheld and destroyed exculpatory information); *Office of Disciplinary Counsel v. Jones*, 613 N.E.2d 178 (Ohio 1993) (imposing 6-month suspension on prosecutor who failed to disclose exculpatory information); *see also Houston v. Partee*, 978 F.2d 362, 369 (7th Cir. 1992), *cert. denied*, 507 U.S. 1005 (1993) (directing clerk to send court's opinion to bar disciplinary authority for further investigation where prosecutors failed to disclose exculpatory information which was discovered after conviction).

The problem is that, despite the theoretical availability of professional discipline, prosecutors are nonetheless rarely sanctioned by the bar. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.2 (1986); Richard Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C.L. REV. 693 (1987) (reviewing all reported cases and surveying disciplinary authorities in forty-one states, and finding only five examples of prosecutors being disciplined). Unfortunately, many prosecutors have misunderstood their role, apparently believing that their duty is to obtain or defend convictions, rather than seek justice. Recent news reports have documented hundreds of cases where murder convictions had been

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4. Effective January 1, 2000, Virginia's lawyers will be bound by the Virginia Rules of Professional Conduct. The new rule for prosecutors is substantially similar to the old rule, and states:

> A lawyer engaged in a prosecutorial function shall . . . make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; . . . .

Rule 3.8.

overturned for prosecutorial misconduct, but found that only a handful of those prosecutors were disciplined by bar authorities. See Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, Chi. Trib., Jan. 10, 11, 12, 13, 14, 1999 (reporting that since this Court's *Brady* decision, 381 homicide convictions have been overturned because of prosecutorial misconduct, but none of the prosecutors involved was disbarred). Thus, it is particularly important that courts, including this Court, reinforce that the lawyers appearing before them must comply with their ethical obligations.

C. The Ethical Obligation to Disclose Includes *All* Exculpatory Information, Regardless of Whether the Information Is "Material" for the Purposes of the Due Process Clause under this Court's Decision in United States v. Bagley.

While this Court has adopted a strict materiality standard in determining whether a prosecutor's failure to disclose exculpatory information constitutes a violation of defendant's constitutional rights under *United States v. Bagley*, 473 U.S. 667 (1985), no such materiality requirement exists under the professional rules. A "prosecutor has an ethical duty to make timely disclosure of exculpatory material and cannot avoid disclosure by attempting to determine the material's ultimate materiality." *Hughes v. Commonwealth*, 431 S.E.2d 906 (Va. Ct. App. 1993), *rev'd on other grounds*, 446 S.E.2d 451 (Va. Ct. App. 1994). The leading law review article on this issue reaches a similar conclusion:

> To fulfill ethical obligations the prosecutor must disclose all exculpatory evidence and must correct all false testimony, whether or not the evidence presented or omitted is important enough, in the context of all of the evidence presented at trial, to warrant a reversal of the conviction. An ethical violation can, and often will, be present even when due process is not violated.

Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C.L. REV. 693, 714 (1987) (footnotes omitted).

The ethical duty to disclose all exculpatory information stems from prosecutors' well-recognized quasi-judicial role. Prosecutors have an obligation to "seek justice," and to ensure that the accused is treated fairly. *See* Bruce Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 615-16 , 634-35 (1999). Imposing this ethical obligation on prosecutors also promotes public confidence in the legal system and the prosecution function. ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT 61:616.

D. The Ethical Obligation to Disclose Exculpatory Information Applies in Post-conviction Proceedings.

This Court recognized in *Imbler v. Pachtman* that even "after a conviction the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." 424 U.S. at 427 n. 25.

The ethical rule does not set out any time limit for when this disclosure obligation ends. *See* VIRGINIA CODE DR 8-102; MODEL CODE DR 7-103(B); MODEL RULE 3.8. Furthermore, the language of Virginia's rule makes it clear that this duty continues in post-conviction proceedings. By its very terms, the disclosure obligation applies not just to prosecutors, but also to "government lawyer[s] in criminal litigation," VIRGINIA CODE DR 8-102, a broader term that clearly comprehends the government lawyer in a habeas corpus proceeding.

In requesting that Senior Assistant Attorney General Curry disclose exculpatory information, Williams' state habeas counsel cited and quoted this ethical rule. [J.A. 346] Nonetheless, Mr. Curry stated in his response that he had no obligation to comply with this request because the Commonwealth was a "defendant" in a civil habeas corpus proceeding rather than a "prosecutor."

A lawyer in the Virginia Attorney General's office who defends a criminal conviction in state or federal habeas corpus proceedings is clearly a "government lawyer in criminal litigation." In fact, in the very letter where Mr. Curry tried to argue that he had no obligation to disclose exculpatory information

because he was not a "prosecutor," [J.A. 353], Mr. Curry identified himself as "Senior Assistant Attorney General, Criminal Litigation Section." [J.A. 354]

If Mr. Curry were aware of the psychiatrist's report, he clearly had an ethical obligation to disclose it. Petitioner has requested an evidentiary hearing on this and other issues, but the District Court and the Fourth Circuit denied that request. While it is always important to ensure that prosecutors act ethically, it is particularly important here, where the Commonwealth is seeking to execute a defendant based on a conviction that is tainted by the failure to disclose exculpatory information.

E. The Court Should Remand this Matter to the District Court to Allow the Commonwealth Attorneys to Fulfill Their Ethical Duties and to Provide Petitioner with a Full Hearing on His Claimed Entitlement to Exculpatory Information.

All government lawyers involved in Williams's criminal trial and post-conviction proceedings, including lawyers in the Commonwealth Attorney's Office and Attorney General's Office, had and continue to have an ethical duty to produce any and all exculpatory information to Williams, regardless of whether it is material. It is clear that the Attorney General's Office did not recognize that duty. [J.A. 353] The Commonwealth Attorney's Office and the Attorney General's Office never produced to Williams the psychiatric report regarding Cruse, an exculpatory document that was likely to change the result obtained here, nor did they search for any other exculpatory material.

As a result, this Court should reverse the decision of the Court of Appeals and remand this matter to the District Court. At that time, the government lawyers should be charged to produce all exculpatory information. Thereafter, Williams should be given a full hearing on his claimed entitlement to have received — before he was ever tried — the psychiatric report regarding Cruse, and any other exculpatory information that is produced after remand.

CONCLUSION

Under the Virginia Code of Professional Responsibility 8-102(A), the Senior Assistant Attorney General responding to petitioner's state habeas claim had an obligation to disclose exculpatory information. Instead, the Senior Assistant Attorney General disclaimed the responsibility entirely.

It is not the duty of the Commonwealth to convict and now seek to execute Petitioner; instead, it is its duty to see that justice is done. This Court should assure both that the Commonwealth's lawyers fulfill their ethical obligations and that Williams receives a fair and full habeas proceeding. No lawyer should be able to ignore the lawyer's ethical obligations, and violation of those obligations, in no event, should lead to petitioner's unwarranted conviction and punishment.

Respectfully submitted,

LAWRENCE J. FOX*
DAVID J. KESSLER
VIKTORIYA MEYEROV
Drinker Biddle & Reath LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
(215)988-2700

* *Counsel of Record*
Counsel for Amici Curiae

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In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION AND BRIEF OF VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS AND VIRGINIA TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MATTHEW P. GEARY, ESQ.
Counsel of Record
GOODWIN, SUTTON, DUVAL & GEARY, P.L.C.
Suite 350
1001 East Broad Street
Richmond, Virginia 23219
(804) 643-0374
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MOTION OF VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS AND VIRGINIA TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Virginia College of Criminal Defense Attorneys (VCCDA) and the Virginia Trial Lawyers Association (VTLA), move jointly pursuant to Rule 37.2, for leave to file the attached brief of *amici curiae* in support of the Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondent has refused consent.

VCCDA, the Virginia affiliate of the National Association of Criminal Defense Lawyers (NACDL), is a statewide non-profit organization of approximately 470 criminal defense practitioners, with the purpose of enhancing the quality of criminal justice in the Commonwealth of Virginia. VTLA is a non-profit professional organization of approximately 2,800 trial lawyers throughout the Commonwealth of Virginia, working to enhance the professionalism and skills of trial lawyers and to promote the fair and effective administration of justice.

Members of VCCDA and VTLA (hereinafter "*Amici*") are regularly retained or appointed by the courts of the Commonwealth and the United States to represent capital and other criminal defendants, and to represent inmates in habeas corpus proceedings. *Amici* are experienced in the habeas corpus scheme currently operating in Virginia and believe that it is important for the Court to be aware of the height and breadth of the institutional obstacles in that scheme which confront death-sentenced inmates like

Williams in state habeas corpus proceedings. An accurate description of the Virginia habeas proceedings for death-sentenced inmates demonstrates that many of the presumptions of the Court of Appeals for the Fourth Circuit about the potential for factual development in the Virginia habeas corpus scheme are not in line with the scheme itself, or the current practice of the state court in habeas corpus proceedings.

For the foregoing reasons, VCCDA and VTLA respectfully request leave to file the attached brief of *amici curiae* in support of petitioner.

Respectfully submitted,

MATTHEW P. GEARY, ESQ.
GOODWIN, SUTTON, DUVAL
& GEARY, P.L.C.
Suite 350
1001 East Broad Street
Richmond, Virginia 23219
(804) 643-0374

Counsel for Amicus Curiae

Dated: December 23, 1999

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INTEREST OF *AMICI CURIAE*

The Virginia College of Criminal Defense Attorneys (VCCDA) and the Virginia Trial Lawyers Association (VTLA) file this joint brief, *see* Rule 37.3(a), in support of the Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondent has refused consent, and *Amici* have sought leave to file this brief from the Court.[1]

VCCDA is recognized by the National Association of Criminal Defense Lawyers (NACDL) as its Virginia state affiliate. VCCDA is a statewide non-profit organization of approximately 470 criminal defense practitioners. Its purpose is to enhance the quality of criminal justice in the Commonwealth of Virginia and to advance the same general goals of NACDL within the framework of Virginia practice. To that end, VCCDA conducts continuing legal education seminars for criminal defense practitioners to improve the quality of their representation. In addition, VCCDA provides direct services to its members when they face important issues implicating the fundamental fairness of the criminal justice system, including litigation advice and support, research, and the filing of amicus briefs.

VTLA is a non-profit professional organization of approximately 2,800 trial lawyers throughout the Commonwealth of Virginia. Founded in 1960, VTLA works to

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than VCCDA, VTLA, and their members, made any monetary contributions to its preparation or submission. *See* Rule 37.6.

enhance the professionalism and skills of trial lawyers and to promote the fair and effective administration of justice. VTLA includes among its special interest sections a Criminal Law Section. Members regularly participate in trials in state and federal courts. As an association of trial lawyers dedicated to preserving the rights of individual litigants in civil and criminal trials, VTLA believes it is well situated to recognize issues of importance to trial lawyers and their clients and to assist the Court.

Members of VCCDA and VTLA (hereinafter *"Amici"*) are regularly retained or appointed by the courts of the Commonwealth and the United States to represent capital and other criminal defendants, and to represent inmates in habeas corpus proceedings. *Amici* are experienced in the unique characteristic of the habeas corpus scheme currently operating in Virginia: the Virginia Supreme Court has refused – in an absolute and unwavering manner – every request ever made by a death-sentenced petitioner in habeas proceedings for the court's assistance in allowing an opportunity to develop and present factual support for federal constitutional claims asserted or potential claims alleged.

The inability of death-sentenced petitioners in Virginia to develop and present evidence in state habeas corpus proceedings makes a full and fair development of the record in those proceedings extraordinarily difficult and unlikely. This inability to develop the record is a formidable barrier to meaningful review of the fairness of the convictions and sentences in these cases. This includes the ability to accurately review the quality of representation at the trials and appeals from which these convictions and sentences arose.

The conviction and death sentence of Petitioner, Michael Wayne Williams, was reviewed by the state court under the habeas corpus scheme mentioned above. *Amici* believe that it is important for the Court to be aware of the height and breadth of the obstacle confronting petitioners like Williams in the Virginia courts when Court examines his case. An accurate description of the Virginia habeas proceedings for death-sentenced inmates demonstrates that many of the presumptions of the Court of Appeals for the Fourth Circuit about the potential for factual development in the Virginia habeas corpus scheme are not in line with the scheme itself or the current practice of the state court in habeas corpus proceedings.

The brief of *Amici* will not address every point argued by the parties. Instead, *Amici* focus on a single issue: the formidable and, thus far, insurmountable barriers to obtaining assistance in the state court for factual development in state habeas corpus proceedings.[2]

SUMMARY OF ARGUMENT

Under the habeas corpus scheme currently in operation in Virginia, death-sentenced inmates do not have a meaningful opportunity to develop factual support for federal constitutional claims alleged in their petitions. The system also unreasonably limits the ability of these petitioners to identify, investigate, develop, and present potential claims. Under the extraordinarily restrictive

[2] *Amici* adopt the Petitioner's Statement of Facts.

scheme in place in Virginia, it is virtually pre-ordained that factual support for constitutional claims will not be completed in state habeas corpus proceedings. Habeas petitioners who seek federal habeas corpus review from this system can turn only to the federal courts in hopes of obtaining a full and fair hearing of their claims.

Since the Virginia Supreme Court assumed exclusive jurisdiction of habeas corpus proceedings for death-sentenced inmates in 1995, ***no death-sentenced inmate has ever received an evidentiary hearing, expert or investigative assistance, discovery of any kind, including Brady material, or even so much as permission to serve a subpoena.***

The state court's refusal to provide for factual development is exacerbated by the Fourth Circuit Court of Appeals' unrealistic impression of the abilities of a Virginia death-sentenced state habeas petitioner to obtain and present factual support for his claims. The expectations of the federal court of appeals and the reality of the state supreme court are a clash of contradiction: the court of appeals requires Virginia death-sentenced inmates to develop and present all known or knowable factual support for claims during the course of state habeas corpus proceeding, but Virginia courts deny every effort by death-sentenced inmates to develop and present the same factual support. Virginia death-sentenced inmates are trapped between the proverbial "rock and a hard place."

Amici are committed to preserving the constitutional rights of all criminal defendants. Because *Amici* believe that significant factual development is often vital to a reliable review of the quality and constitutional character

of representation of criminal defendants, and the constitutional adequacy of their convictions and sentences – especially before imposition of the death penalty – *Amici* believe that the decision of the court of appeals in this case must be overturned.

TABLE SUMMARY
OF VIRGINIA HABEAS CORPUS PROCEEDINGS
FOR DEATH-SENTENCED INMATES
AFTER JULY 1, 1995

Number of Cases Reviewed	31
Number of Cases In Which A Hearing Was Granted	0
Number of Cases In Which Expert or Investigative Assistance Was Granted	0
Number of Cases In Which Discovery Was Granted	0
Number of Cases In Which Relief Was Granted	0

ARGUMENT

THE VIRGINIA STATE HABEAS CORPUS SCHEME FOR DEATH-SENTENCED INMATES DOES NOT PROVIDE REASONABLE AND NECESSARY OPPORTUNITIES FOR THE DEVELOPMENT AND PRESENTATION OF FACTUAL SUPPORT FOR FEDERAL CONSTITUTIONAL CLAIMS.

Effective July 1, 1995, the Virginia General Assembly amended and modified habeas corpus proceedings for death-sentenced inmates. The statutory amendments

enacted by the Virginia legislature placed certain time restrictions on habeas corpus proceedings for death-sentenced inmates.[3] The legislation also took jurisdiction over habeas corpus proceedings of death-sentenced inmates away from the local circuit courts and gave exclusive jurisdiction to the Virginia Supreme Court. Va. Code § 8.01-654.C. Not long after the amendments went into effect, the Virginia Supreme Court enacted special provisions further restricting the habeas corpus proceedings of death-sentenced inmates. *See, e.g.*, Va. S. Ct. R. 5:7A (specifying contents of petition and restricting length of petition to fifty pages or less, time for filing Reply, and time for filing Response to motions).

Because Mr. Williams' case was reviewed by the state court under this scheme, the arguments, summaries and other statements relative to habeas corpus proceedings

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[3] For example, the amendments require that death-sentenced inmates file their petitions within sixty days of the denial of certiorari review after direct appeal (if sought), Va. Code § 8.01-654.1, and set out a specific time frame within which evidentiary hearings, if any, must be conducted and resolved, Va. Code § 8.01-654.C. Prior to these amendments, no time restrictions were placed on habeas petitioners, including death-sentenced petitioners. The 1995 amendments established time limits within which the local circuit courts are required to set execution dates at various points in post-conviction review. Va. Code § 53.1-232.1. The amendments also included a provision that the local circuit appoint counsel for habeas corpus proceedings within thirty days of the affirmance of a death sentence on direct appeal, Va. Code § 19.2-163.7. The provisions for filing deadlines and setting execution dates have been strictly enforced. The mandatory appointment provisions, on the other hand, have not been consistently followed. No evidentiary hearing has been allowed to date.

made *infra* refer only to cases reviewed under the current scheme.[4]

A. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Summarily Denied The Petition For Writ Of Habeas Corpus Of Every Death-Sentenced Inmate Which Has Been Presented To The Court.

Since the Virginia statutes governing the habeas corpus proceedings of death-sentenced inmates were amended in 1995, the Virginia Supreme Court has ruled on thirty-one original habeas petitions from death-sentenced inmates. Every one of these was summarily denied.[5] Every death-sentenced inmate who has sought

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[4] Williams' petition was filed *after* the 1995 statutory amendments but *prior* to enactment of Va. S. Ct. R. 5:7A.

[5] *See e.g., Barnabei v. Director*, No. 971459 (Va. Oct. 15, 1997) (Order); *Beck v. Director*, No. 980330 (Va. Jan. 28, 1999) (Order); *Burket v. Director*, No. 951590 (Va. Nov. 20, 1996) (Order); *Cardwell v. Director*, No. 951593 (Va. May 3, 1996) (Order); *Chandler v. Warden*, No. 952348 (Va. Aug. 5, 1996) (Order); *Chichester v. Warden*, No. 951591 (Va. Nov. 19, 1996) (Order); *Clagett v. Director*, No. 970783 (Va. Dec. 15, 1997) (Order); *Dubois v. Warden*, No. 952029 (Va. Mar. 15, 1996) (Order); *Fitzgerald v. Angelone*, No. 961017 (Va. Oct. 16, 1996) (Order); *Fry v. Angelone*, No. 961085 (Va. Nov. 19, 1996) (Order); *Goins v. Warden*, No. 962477 (Va. May 5, 1997) (Order); *Graham v. Director*, No. 960868 (Va. Oct. 16, 1996) (Order); *Jackson v. Warden*, No. 991477 (Va. Nov. 18, 1999) (Order); *Jenkins v. Warden*, No. 960246 (Va. June 18, 1996) (Order); *Joseph v. Warden*, No. 952133 (Va. Nov. 20, 1996) (Order); *King v. Warden*, No. 952099 (Va. Mar. 14, 1996) (Order); *Mickens v. Warden*, No. 971669 (Va. Dec. 15, 1997) (Order); *Ramdass v. Director*, No. 951594 (Va. Mar. 18, 1996) (Order); *Roach v. Warden*, No. 962568 (Va. Apr. 30, 1997) (Order);

rehearing of a denial of habeas corpus relief has been refused rehearing. None of the petitioners in these cases had presented a habeas corpus petition to the state court previously.

B. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Never Granted An Evidentiary Hearing To Any Death-Sentenced Inmate.

Virginia Supreme Court Rules require the petitioner in a capital habeas proceeding to state whether "the taking of evidence is necessary for the proper disposition of the petition." Va. S. Ct. R. 5:7A(b). Every death-sentenced inmate who has filed a habeas corpus petition has requested that the state court grant an evidentiary hearing at which he would be provided an opportunity to develop and present factual support for his non-defaulted constitutional claims.[6] Every inmate's request

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Royal v. Warden, No. 960620 (Va. June 18, 1996) (Order); *Sheppard v. Director*, No. 961086 (Va. Oct. 17, 1996) (Order); *Stewart v. Angelone*, No. 952042 (Va. Mar. 18, 1996) (Order); *Swann v. Warden*, No. 951583 (Va. Mar. 18, 1996) (Order); *Thomas v. Warden*, No. 960749 (Va. June 17, 1996) (Order); *Walton v. Warden*, No. 990305 (Va. Aug. 9, 1999) (Order); *Weeks v. Warden*, No. 952145 (Va. Mar. 15, 1996) (Order); *Marlon Williams v. Angelone*, No. 970491 (Va. June 20, 1997) (Order); *Michael Williams v. Warden*, No. 951589 (Va. Mar. 18, 1996) (Order); *Terry Williams v. Warden*, No. 960534 (Va. June 6, 1997) (Order); *Wilson v. Netherland*, No. 952118 (Va. Mar. 15, 1996) (Order); *Wright v. Warden*, No. 951592 (Va. Mar. 14, 1996) (Order).

[6] Every petition mentioned above has included allegations that the convictions and/or sentences imposed were the result of the denial of the constitutional right to effective assistance of counsel. Under Virginia law, such claims can only be presented in state habeas corpus proceedings. Many petitions have also alleged misconduct, including that by prosecutors, police, and jurors.

has been denied without any comment or explanation. *See* Note 5, *supra*.

C. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Never Granted Expert Or Investigative Assistance Of Any Kind To Any Death-Sentenced Inmate.

The Virginia Supreme Court has refused every request made by a death-sentenced inmate to obtain the assistance of an expert or investigator to identify, develop, or present factual support for claims alleged in the petition.[7] Every capital petitioner has been indigent at

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[7] *See e.g.*, *Barnabei v. Director*, No. 971459 (Va. Oct. 15, 1997) (order); *Beck v. Director*, No. 980330 (Va. Aug. 4, 1998) (order); *Burket v. Director*, No. 951590 (Va. June 13, 1996) (order); *Cardwell v. Director*, No. 951593 (Va. Dec. 15, 1995) (order); *Chichester v. Warden*, No. 951591 (Va. Nov. 19, 1996) (order); *Clagett v. Director*, No. 970783 (Va. Dec. 15, 1997) (order); *Fitzgerald v. Angelone*, No. 961017 (Va. Oct. 16, 1996) (order); *Fry v. Angelone*, No. 961085 (Va. Mar. 15, 1996) (order); *Goins v. Warden*, No. 962477 (Va. May 5, 1997) (order); *Graham v. Director*, No. 960868 (Va. June 26, 1996) (order); *Jackson v. Warden*, No. 991477 (Va. Aug. 4, 1999) (order); *Jenkins v. Warden*, No. 960246 (Va. Mar. 5, 1996) (order); *Joseph v. Warden*, No. 952133 (Va. Nov. 20, 1996) (order); *King v. Warden*, No. 952099 (Va. Mar. 14, 1996) (order); *Ramdass v. Director*, No. 951594 (Va. Jan. 19, 1996) (order); *Royal v. Warden*, No. 960620 (Va. June 18, 1996) (order); *Stewart v. Angelone*, No. 952042 (Va. Mar. 18, 1996) (order); *Walton v. Warden*, No. 990305 (Va. Mar. 10, 1999) (order); *Marlon Williams v. Angelone*, No. 970491 (Va. June 20, 1997) (order); *Michael Williams v. Warden*, No. 951589 (Va. Mar. 18, 1996) (order); *Wilson v. Netherland*, No. 952118 (Va. Mar. 15, 1996) (order); *Wright v. Warden*, No. 951592 (Va. Dec. 15, 1995) (order).

the time of his habeas proceedings and required the financial support of the state court in order to obtain the requested assistance.

The Virginia Supreme Court has denied expert assistance even in cases where the court had acknowledged previously that its ability to assess the prejudice resulting from trial counsel's failure to obtain a mental health expert at trial is left to "mere speculation." *See, e.g., Cardwell v. Commonwealth,* 450 S.E.2d 146, 152 (Va. 1994).[8] The state court has never explained the bases for its denials nor cited a legal standard or authority applied in these decisions.

The failure of the state court to allow assistance to death-sentenced inmates has proven especially restrictive because of the Virginia Attorney General's recent practice of advising State experts and investigators familiar with the cases of death-sentenced inmates not to speak with counsel appointed to assist in state habeas corpus proceedings. In these cases, State personnel such as State Police personnel or forensic lab scientists and technicians, after initially discussing the case with habeas counsel, have subsequently told counsel that they had been directed by an Assistant State Attorney General acting as counsel to the particular State Agency involved, not to speak further with petitioner's habeas counsel. *See, e.g., Beck v. Director,* No. 980330 (Va.); *Swisher v. Warden,* No. 992792 (Va.). In these instances, the very same Assistant State Attorney

[8] The state court made this observation in its direct appeal opinion. In state habeas proceedings, Cardwell repeatedly attempted to obtain expert assistance to demonstrate prejudice. Each request was denied.

General was simultaneously acting as counsel for the Respondent.

In these cases, as in all other cases, the petitioners' motions to depose these witnesses, to subpoena documents in their possession, or to have a hearing at which witnesses could be called to testify and produce documents to be entered into evidence, have been refused.

D. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Never Granted Discovery Of Any Kind To Any Death-Sentenced Inmate.

In Virginia, "no discovery shall be allowed in any proceedings for a writ of habeas corpus . . . without prior leave of the court, which may deny or limit such discovery in any such proceeding." Va. S. Ct. R. 4:1(b)(5). The Virginia Supreme Court has never granted discovery of any kind to a death-sentenced inmate.[9] The court has

[9] *See e.g., Barnabei v. Director,* No. 971459 (Va. Oct. 15, 1997) (order); *Beck v. Director,* No. 980330 (Va. Aug. 4, 1998) (order); *Burket v. Director,* No. 951590 (Va. Nov. 20, 1996) (order); *Cardwell v. Director,* No. 951593 (Va. Dec. 15, 1995) (order); *Chichester v. Warden,* No. 951591 (Va. Nov. 19, 1996) (order); *Clagett v. Director,* No. 970783 (Va. Dec. 15, 1997) (order); *Jackson v. Warden,* No. 991477 (Va. Aug. 4, 1999) (order); *Joseph v. Warden,* No. 952133 (Va. Nov. 20, 1996) (order); *King v. Warden,* No. 952099 (Va. Mar. 14, 1996) (order); *Ramdass v. Director,* No. 951594 (Va. Jan. 19, 1996) (order); *Royal v. Netherland,* No. 960620 (Va. June 18, 1996) (order); *Walton v. Warden,* No. 990305 (Va. Mar. 9, 1999) (order); *Marlon Williams v. Angelone,* No. 970491 (Va. June 20, 1997) (order); *Michael Williams v. Warden,* No. 951589 (Va. Mar. 18, 1996) (order).

never cited a legal or factual basis for its denials, and never stated or discussed its reasons for denying discovery.

This Court recognizes that the threshold for obtaining discovery in Virginia habeas proceedings is extraordinarily high, particularly where the petitioner seeks to discover exculpatory information from state agents. *See, e.g., Strickler v. Greene,* 119 S. Ct. 1936, 1950-51 (1999). Detailed information about the limitations on discovery in Virginia post-conviction proceedings is contained in the Brief of the National Association of Criminal Defense Lawyers, Virginia College of Criminal Defense Attorneys, Virginia Trial Lawyers Association, and Virginia Capital Case Clearinghouse as *Amici Curiae* In Support of Petitioner in *Strickler v. Greene,* No. 98-5864, which is incorporated herein by reference.

Respondent has persistently maintained in the state court that he has no obligation to provide petitioners with exculpatory material evidence, and no intention of even attempting to discover whether such information exists. The Virginia Supreme Court has never required Respondent to produce, seek to discover, or make an accounting of the existence of material exculpatory evidence in the possession of the State and unavailable to petitioners. Respondent has stated that he has "no intention . . . of [inspecting and reviewing files] for the purpose of identifying, material, exculpatory evidence." See Joint Appendix at 352.

Although Respondent opposes every attempt made by death-sentenced inmates to obtain opportunities or

assistance to develop factual support for claims made in habeas corpus, he also invariably argues in subsequent federal proceedings, as he has done in Michael Williams' case, that the inmate is absolutely bound by the "universe of facts" he presented in the state habeas corpus proceedings, no matter what kinds of restrictions are placed on the petitioner, or the degree of those constraints. For example, despite this Court's decision in *Strickler,* Respondent continues to maintain that state habeas counsel is obliged to discover and present even evidence to which Virginia law prohibits him access! *See, e.g., Mickens v. Greene,* No. 3:98cv102 (E.D.Va. November 5, 1999).[10]

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[10] *Mickens* involved a conviction and death sentence for the murder and attempted sodomy of a 17-year old boy. In federal habeas corpus, a state juvenile court clerk accidentally and improperly allowed federal habeas counsel to examine the victim's juvenile records. Those records revealed that the same attorney who accepted appointment to represent Mickens at the capital murder trial, was representing the juvenile victim on charges of assault and carrying a concealed weapon at the time of the capital offense. Respondent argued that, because the court clerk had accidentally and improperly allowed federal habeas counsel to examine the confidential juvenile file, state habeas counsel was obliged to have obtained the same accidental and improper allowances during state habeas corpus proceedings.

In *Mickens,* the District Court found that "state law requirements for secrecy of juvenile court records operated . . . to preclude Mickens from raising the conflict of interest claims in his state habeas petition." Memo Op. at 26. "Nonetheless," the court noted,

> and without any credible decisional support, the Commonwealth persists in asserting that [the claims based upon the juvenile court records] were reasonably available to state habeas counsel because

E. The Fourth Circuit Mistakenly Presumes That The Virginia Supreme Court And The Virginia General Assembly Are Willing, Or Should Be Willing, To Pay Appointed State Habeas Counsel To Conduct Unreasonably Broad Investigations.

Under the system described above, it would be unreasonable for court-appointed state habeas counsel to presume authorization to expend time and resources to identify, locate, examine, and review every potential piece of evidence, and every potential witness, whether or not an initial consideration of the evidence or witness indicated that such a pursuit would be helpful to the review of the case.

The case now before the Court provides an apt illustration of the unmanageable folly which would be produced by the limitless responsibility the court of appeals would impose on petitioner's state habeas counsel. The juror at issue in this case stated under oath that she was not related to any witness in the case even though she was the former wife of a witness – the Deputy Sheriff – and had shared custody of their four children with the witness until the children became adults. The court of appeals' ruling would require attorneys appointed in

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> federal habeas counsel discovered the factual basis for the claim. It is charitable to call that argument frivolous because the fortuitous circumstances by which federal habeas counsel discovered the truth about [trial counsel's] conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings. . . . To argue otherwise is disingenuous.

Id. at 28-29.

state habeas to investigate and corroborate every specific sworn representation such as that made by the juror or any other person involved in the case.

Under the scheme suggested by the court of appeals, state habeas counsel must engage in every "fishing expedition" imaginable, including those for which all evidence suggests an unproductive result. Because Virginia by statute provides for appointment of counsel, the Commonwealth would be required to compensate counsel for pursuing these unpromising efforts.

Amici strongly maintain that it would be unreasonable to require appointed state habeas counsel to go to the excessive and untenable lengths suggested by the decision of the court of appeals in this case, when there is no indication that these efforts would be considered reasonable or compensable, let alone be endorsed or encouraged, by the state court or legislature which established the parameters of state habeas corpus litigation.

CONCLUSION

For the foregoing reasons, *Amici* urge that the decision of the Court of Appeals for the Fourth Circuit be reversed.

Respectfully submitted,
MATTHEW P. GEARY, ESQ.
GOODWIN, SUTTON, DUVAL
& GEARY, P.L.C.
Suite 350
1001 East Broad Street
Richmond, Virginia 23219
(804) 643-0374

Counsel for Amicus Curiae

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IN THE SUPREME COURT OF THE UNITED ~~STATES~~

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS, *Petitioner*,

v.

JOHN B. TAYLOR, WARDEN, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, GEORGIA, ILLINOIS, INDIANA, MARYLAND, MASSACHUSETTS, MISSOURI, MONTANA, NEBRASKA, NEVADA, NORTH CAROLINA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WASHINGTON IN SUPPORT OF RESPONDENT

BILL LOCKYER
Attorney General of California
DAVID P. DRULINER
Chief Assistant Attorney General
JOHN R. GOREY
Acting Senior Assistant Attorney General
DONALD E. DE NICOLA*
Deputy Attorney General
Counsel of Record*
300 South Spring Street
Los Angeles, California 90013
Telephone: (213) 897-2388
Fax: (213) 897-2408
Counsel for Amici Curiae

(Additional counsel listed inside cover)

BEST AVAILABLE COPY

Bill Pryor
Attorney General of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Janet Napolitano
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007-2926

Mark Pryor
Attorney General of Arkansas
323 Center Street
Little Rock, Arkansas 72201

M. Jane Brady
Attorney General of Delaware
820 North French Street
Wilmington, Delaware 19801

Robert A. Butterworth
Attorney General of Florida
The Capitol Suite, PL-01
Tallahassee, Florida 32399

Thurbert E. Baker
Attorney General of Georgia
40 Capitol Square, S.W.
Atlanta, Georgia 30334

James E. Ryan
Attorney General
State of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Jeffrey A. Modisett
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

J. Joseph Curran, Jr.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

Thomas F. Reilly
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

Jeremiah W. (Jay) Nixon
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, Missouri 65101

Joseph P. Mazurek
Attorney General
State of Montana
Justice Building
P.O. Box 201401
Helena, Montana 59620-1401

Don Stenberg
Nebraska Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509

Frankie Sue Del Papa
Attorney General
State of Nevada
100 N. Carson St.
Carson City, Nevada 89701-4717

Michael F. Easley
Attorney General of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602

W. A. Drew Edmondson
Attorney General of Oklahoma
2300 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105

Hardy Myers
Attorney General
1162 Court Street, N.E.
Salem, Oregon 97310

BEST AVAILABLE COPY

D. Michael Fisher
Attorney General
Commonwealth of Pennsylvania
16th Floor
Strawberry Square
Harrisburg, Pennsylvania 17120

Charles M. Condon
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Mark Barnett
Attorney General of South Dakota
500 East Capital Avenue
Pierre, South Dakota 57501

John Cornyn
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

Jan Graham
Utah Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Christine O. Gregoire
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504

QUESTION PRESENTED

Whether a State prisoner has "failed to develop the factual basis of a claim in State court proceedings," for purposes of applying the prohibition against federal court evidentiary hearings under new 28 U.S.C. §2254(e)(2) and the statutory exceptions, if he did not properly present the facts to the State court, regardless of the reason he did not do so.

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INTEREST OF AMICI CURIAE

Amici are States charged with the responsibility of enforcing their criminal law and defending final state criminal convictions. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) helps insulate those convictions from attack in the federal courts; and new Section 2254(e)(2) of Title 28 of the United States Code guarantees that the state courts will have the first opportunity to review the bases for such attacks in a timely way in orderly state procedures. Diminution of the proper scope of Section 2254(e)(2) would undermine important interests of comity and finality. Amici submit this brief in support of the respondent in this case, through their respective Attorneys General, under this Court's Rule 37.4.

SUMMARY OF ARGUMENT

In enacting the habeas corpus reforms contained in the AEDPA, Congress achieved two basic goals. It elevated the role of the State courts, making their consideration of the petitioner's claims determinative in almost all cases. At the same time, it curtailed the power of the federal courts, streamlining their procedures and narrowing their jurisdiction to grant relief to the rare case. In accomplishing these ends, Congress took the lead from this Court, which already had recognized, in the interests of finality and comity, many substantial restrictions on the availability of the writ even for potentially meritorious constitutional claims.

As with the other habeas reforms adopted in the AEDPA, Section 2254(e)(2) of Title 28 is designed to limit relief in

the federal courts. In flatly prohibiting federal evidentiary hearings on the factual bases of claims not properly presented to the State courts, Section 2254(e)(2) provides a new and valuable protection for the important policies underlying the "exhaustion of State remedies" and procedural bar doctrines previously formulated by this Court. Further, it provides an effective weapon against the "morphing" of old claims into new and different ones after the commencement of federal proceedings. Section 2254(e)(2) in these ways re-strikes the balance, in favor of the States but with due regard for the petitioner, between finality and comity and the protection of the innocent. The new statute allows a hearing on belated claims with undeveloped facts only in cases presenting strong innocence-related proof.

The threshold condition for the operation of Section 2254(e)(2)—*i.e.*, "if the applicant has failed to develop the factual basis of a claim in State court proceedings"—is fulfilled whenever the facts were not properly presented to the State court during the period in which the State court's doors would have been open to hear the petitioner's claims on their merits. Because the onus obviously is on the petitioner to avoid a presumptively-correct, final State court judgment and sentence, an "unachieved condition" of factual development logically must be ascribed to the petitioner and properly must be described as his failure. Even if that conclusion were not plain, the structure of Section 2254(e)(2) would dictate the same result, for it explicitly treats excusable failures—where the factual predicate "could not have been previously discovered through the exercise of due diligence"—as a basis for an exception to the evidentiary-hearing prohibition. It would make no sense to

treat it that way if the prohibition were not even applicable in the first place.

Nor does Section 2254(e)(2) imply that federal courts should peer over the shoulder of the co-equal State judiciary and second-guess how State standards for funding, discovery, evidentiary hearings, etc., were applied in individual cases. Congress determined to trust the State courts to deal fairly with federal claimants, and set out no federal standards for the State courts to meet in affirmatively promoting collateral attacks on their own criminal judgments. Second-guessing and distant scrutiny of State-law decisions by federal courts would be inimical to that trust and beyond the competence of the federal judiciary.

Although petitioner in this case presents no substantial claim that the State unconstitutionally suppressed evidence until it was too late for him to develop the facts in the State courts, Section 2254(e)(2)'s prohibition against evidentiary hearings would govern such a claim. The statute broadly proscribes hearings on undeveloped claims, of any type, and provides innocence-related exceptions in the areas of "new" retroactive rules of law and factual bases that could not have been discovered with diligence. A claim of unconstitutional suppression of evidence, governed generally by the statute, could fit into the statutory exceptions if serious enough. Because petitioner in this case "failed to develop" the facts, and admits that he cannot meet the statutory exceptions, the Fourth Circuit reached the correct result in rejecting his petition without an evidentiary hearing.

ARGUMENT

Section 2254(e)(2) Prohibits A Federal Evidentiary Hearing to Prove Alleged Facts Not Fairly Presented in State Court by the Petitioner, Regardless of Why They Were Not Presented, Unless He Meets the Exceptions Built into the Statute

Background of Section 2254(e)(2)

Two waves of modern reforms restricting the ancient writ of habeas corpus have helped restore the writ to its proper place in our federal system. This Court was the vanguard of the first wave. In a long series of cases, it recognized compelling justifications for a variety of limitations on the availability of the writ for novel constitutional claims, *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plur. op.), for Fourth Amendment claims, *Stone v. Powell*, 428 U.S. 465, 492-4 (1976), for claims flouting state procedural rules, *Coleman v. Thompson*, 501 U.S. 722, 740-51 (1991), and for claims raised in piecemeal fashion, *McCleskey v.* Zant, 499 U.S. 467, 487 (1991), or otherwise belatedly in federal court, *O'Sullivan v. Boerckel*, 526 U.S. 838, ___ (1999); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 12 (1992) . See also *Calderon v. Thompson*, 523 U.S. 538, 554-9 (1998); *Brecht v. Abrahamson*, 507 U.S. 619, 635-9 (1993). To be sure, this Court never lost sight of the writ's value as a safeguard against fundamental miscarriages of justice resulting in the conviction of innocent people, see *Murray v. Carrier*, 477 U.S. 478, 496 (1986); but it likewise "never defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial

free of constitutional error," *Kuhlmann v. Wilson*, 447 U.S. 436, 447 (1986). In reforming habeas corpus by disallowing certain classes of claims, even if meritorious, this Court demonstrated renewed respect for the States' interest in finality in criminal law and for the conscientiousness with which the "co-equal" State courts seek to enforce the federal rights of criminal defendants. *Sawyer v. Smith*, 497 U.S. 227, 241 (1990); see *Abrahamson*, 507 U.S. at 636.

Four years ago, Congress was the vanguard of a second wave of fundamental reforms, embodied in the AEDPA. The clear plan and purpose of the AEDPA's reforms in state-prisoner cases was to elevate the importance of the State courts' role in adjudicating federal claims and to circumscribe dramatically the later role of the federal courts in the process. The AEDPA's habeas corpus reforms uniformly venture beyond this Court's earlier, similar jurisprudence. Thus, the AEDPA imposes, for the first time, a "statute of limitations" for the initiation of habeas corpus proceedings by state prisoners. 28 U.S.C. §§ 2244(d), 2263. It broadly prohibits federal relief on claims "adjudicated on the merits" in State courts, excepting only cases of the most obvious error. § 2254(d). It tightens, beyond this Court's own restrictions, standards for allowing second or successive petitions. §§ 2244(b), 2266(b)(3)(B). It does away with prisoner appeals based upon non-constitutional grounds. § 2253(c). It rejects exceptions, traceable to an opinion by this Court, to the "presumption of correctness" accorded to state-court factfinding. § 2254(e)(1). And, in capital cases in qualifying States, it further narrows many of its own general restrictions, and imposes strict time-limits upon the federal court's review of State convictions. §§ 2263, 2264, 2266 et seq. Consonant with this Court's modern jurisprudence, the

two hallmarks of the Congressional reforms are: one, well-placed trust that the State courts will faithfully enforce the accused's constitutional rights in criminal trials and post-conviction procedures; and, two, the reservation of the federal writ for the rare case involving only the most egregious malfunction of State processes, especially if it results in punishing an innocent person. See *Thompson*, 523 U.S. at 558 (AEDPA's "central concern" is that a concluded criminal proceeding "not be revisited" absent "a strong showing of innocence"); see also § 2254(d).

Purpose and Operation of Section 2254(e)(2)

Those same policies underlie the particular reform at issue in this appeal: the AEDPA's outright prohibition against federal evidentiary hearings, except in narrowly-defined circumstances, to adjudicate facts that had not been developed in state court proceedings. In this provision, again, Congress has taken habeas corpus reform a further step in the direction already marked by this Court's own cases. New Section 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that— (A) the claim relies on—(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim

> would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The provision addresses a chronic problem—the sudden presentation, for the first time in federal rather than state court, of new alleged facts as the bases for federal claims. This problem lies at the focal point of the AEDPA's goal of intensifying reliance upon the State courts as the "main event" in habeas corpus cases. Congress and this Court have consistently demanded that a petitioner "fairly present" both the legal and the factual bases of his federal claims in state court before proceeding to federal court. 28 U.S.C. § 2254(b); *Gray v. Netherland*, 518 U.S. 152, 163 (1996). Recognizing the tendency of prisoners to seek to avoid the State courts, which are most knowledgeable about their own cases, this Court has insisted that exhaustion of remedies in State court be "serious" and "meaningful." *Tamayo-Reyes*, 504 U.S. at 10. But habeas corpus petitioners nevertheless flout the "fair presentation" requirement in hopes of seeking what they perceive as a friendly forum—or, in capital cases, as a way of dragging out the proceedings and delaying execution of the sentence.

Because the AEDPA contemplates that State proceedings will almost always be determinative, see *Thompson*, 523 U.S. at 558, the prisoner's temptation to avoid State court has become much stronger. Some prisoners hope that alleging new facts in support of a claim in federal court might evade the AEDPA's new rule barring relief, except in extreme circumstances, for claims "adjudicated on the merits" in state court. § 2254(d); see

Terry Williams v. Taylor, No. 98–8384 (cert. granted, 4-5-99; oral arg., 10-4-99). Similarly, petitioners are tempted to try to avoid the AEDPA's enhanced presumption of correctness for state court findings on factual issues. § 2254(e)(1). At the same time, prisoners feed on the inappropriate largess of some federal courts that allow unjustified discovery or that pay for unfocused "fishing expedition" investigations to drum up new pretexts, never presented to the state courts, for attacking final and presumptively correct state convictions. E.g., *Calderon v. United States District Court (Thomas)*, 144 F.3d 618, 621 (9th Cir. 1998) (allowing discovery on unexhausted claim); *Calderon v. District Court (Gordon)*, 107 F.3d 756, 761-2 (9th Cir. 1997) (allowing investigative fees to pursue unexhausted claims after dismissal of federal petition); *In re Robbins*, 18 Cal.4th 770, 783, 790, 77 Cal.Rptr.2d 153 (Ca. 1997) (federal discovery allowed on unexhausted claim).

A recent Price-Waterhouse-Coopers report, commissioned by the Administrative Office of the United States Court, adumbrates the costs of the problem that Section 2254(e)(2) helps to solve. In reviewing "open" capital habeas corpus cases over 1992-98, the report found that the average cost of the initial federal-petition stage was $129,363, and that the average cost of the subsequent evidentiary-hearing stage was another $54,594. "Cost of Private Panel Representation in Federal Capital Habeas Corpus Cases from 1992 to 1998" (Feb. 9, 1999), pp. vi-viii, V-40-43, 70-76, VIII-119. However else one might criticize such large expenditures to attack final State judgments, it is safe to say that the funding disserves comity and federalism and the legal doctrines requiring fair presentation of claims in the State court prior to federal proceedings, not to mention

the deleterious effect on accuracy wrought by factual disputes asserted after finality of the State judgment. Still less would "business as usual" along these lines in the federal court serve Congress' intent, in enacting the AEDPA and Section 2254(e)(2), of trusting the States and minimizing the role of federal review.

Sometimes, more by design than by accident, new "facts" insinuate themselves by stealth into the federal case at the post-petition or evidentiary hearing stages. Once adduced through the effort and expense associated with evidentiary hearings, see Price-Waterhouse-Coopers Report, *supra*, the new fact allegations reconfigure the original claims and build up an inertia that shapes the ultimate decision, despite the lack of development in the State court. For example, in *Weaver v. Thompson*, 197 F.3d 359, 364-5 (9th Cir. 1999), the petitioner in the federal evidentiary hearing "morphed" the fact basis of his claim from an allegation that a bailiff had coerced his jurors to hurry and return a verdict in one day, to the allegation that, even though the jurors knew there was no time limit, the bailiff instead had told them they must reach verdicts on all counts. The Ninth Circuit dismissed the State's objection as "hairsplitting"; but it was the new evidentiary-hearing fact that, in the appellate court's view, justified relief.[1] *Id.*

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[1] In capital habeas corpus cases, the problem is exacerbated. Habeas corpus petitions in California death-penalty cases, for example, typically comprise hundreds of pages of convolution. The petitioners' apparent purpose is to maintain maximum flexibility in fitting into the original construct of the petition any new evidence adduced at later stages of the federal proceedings, when any appetite for strict enforcement of exhaustion and procedural-bar rules is at its lowest ebb.

The AEDPA affords the States new protections against these metamorphoses, overt or subtle, in the factual bases of federal claims. Alone and in combination with other reforms, new Section 2254(e)(2) helps obviate uncertain inquiries about whether new fact allegations materially alter a claim so as to render it unexhausted and unavailable to petitioner under Section 2244, see *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); similarly, it works to render immaterial the question whether a claim asserted in federal court differs from a claim "adjudicated on the merits" in state court so that the claim arguably might remain available notwithstanding Section 2254(d). Now, regardless whether new facts might change the nature or the strength of the federal claim, Section 2254(e)(2) imposes a flat threshold proscription against proving the new facts in the federal court at all. Except in the rare circumstances outlined in the statute's exceptions, the facts upon which state relief was denied will be the only facts the federal court will consider in federal habeas corpus proceedings.

Another benefit of the approach fostered by Section 2254(e)(2) is that, along with related AEDPA reforms, it further discourages so-called "ping pong" games, see *Harris v. Reed*, 489 U.S. 255, 269-70 (1989) (con. op., O'Connor, J.), in which petitioners delay ultimate resolution of the federal case while they return to State court with new claims. For example, new Section 2254(b)(3) shields the States from unintended, judge-imposed forfeiture of "exhaustion" defenses, and thus reduces the risk that new facts ultimately will serve as the basis for federal relief. And new Section 2254(b)(2) permits rejection of the petition with prejudice even if it contains unexhausted claims. These new provisions work in tandem with Section 2254(e)(2) so that,

in cases where the petitioner still might have access to the State court with his new fact allegations, he will bear a heightened risk of being forever precluded from proving his claim if he improperly chooses to seek federal relief first. Notwithstanding the appearance of new facts or factual allegations in the course of federal proceedings, the State in such cases may defer exhaustion defenses under Section 2254(b)(3), and rely primarily upon the flat proscription in Section 2254(e)(2). The claim, to the extent based upon any new or "unexhausted" facts, thus would fail on the merits for lack of proof under Section 2254(b)(2), see *Breard v. Greene*, 523 U.S. 371, 376 (1998), without any temporary dismissal of the petition for a time-consuming "ping pong" round of litigation in the state courts.

More obvious than its effect on unexhausted claims or claims "adjudicated on the merits" in State court, and even more important, is the direct effect of Section 2254(e)(2) on new facts that no longer may be presented to the State court. It is in this context that petitioner Williams' case arises. Under Section 2254(e)(2), a petitioner in such a circumstance cannot prove new facts in a federal evidentiary hearing, unless he meets the statutory exceptions. In restricting belated proof of new facts in this way, Section 2254(e)(2) conforms with the AEDPA's main purpose of strengthening the comity and finality protections recognized in this Court's own procedural-default opinions. As acknowledged in the ACLU amicus curiae brief (ACLU Br. 16-17), Section 2254(e)(2)'s operation in this regard generally parallels the workings of the procedural rule constructed by this Court in its pre-AEDPA decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1. Under *Tamayo-Reyes*, a state prisoner must establish "cause and prejudice," see

Wainwright v. Sykes, 433 U.S. 72, 87 (1977), or sufficient proof of "actual innocence," see *Schlup v. Delo*, 513 U.S. 298, 313-32 (1995), before obtaining an evidentiary hearing for facts never developed in state court proceedings. Under Section 2254(e)(2), a petitioner cannot obtain a hearing, if he did not develop the facts in state court, unless he shows, first, that the legal basis (A)(i) or the factual basis (A)(ii) of his claim had been unavailable. Second, he must make an innocence-related showing beyond establishing "that it is *more likely than not* that no reasonable juror would have convicted [the petitioner] in the light of the new evidence," *Schlup*, at 327 [emphasis added]; instead, the petitioner must show that "the facts underlying the claim would be sufficient to establish by *clear and convincing evidence* that *but for the constitutional error*, no reasonable factfinder would have found the applicant guilty of the underlying offense," § 2254(e)(2)(B) [emphasis added].

A Petitioner "Fails to Develop" the Facts Whenever He Does Not Properly Present Them to the State Court

Petitioner, like the ACLU, portrays the provision as interpreted by the Fourth Circuit in this case as too harsh or radical, and asks that it be mitigated by judicial construction of the "failed to develop" language in paragraph (e)(2) so that the provision would be deemed wholly inoperative unless the gap in the State record had been "attributable to petitioner" (Pet. Br. 20-21) rather than "the State's fault" (ACLU Br. 6, 10-14). Under these views, apparently, the provision would be inapplicable unless the State acquiesced in the petitioner's demand for affirmative public assistance—in the form of money, discovery, or an

evidentiary hearing—in attacking his final judgment of conviction. (See Pet. Br. 20-28; ACLU Br. 11.) Nothing in the language of the provision, or the evident plan of the AEDPA, would support such a view.

Petitioner points out that the Section 2254(e)(2) prohibition depends upon whether "the applicant has failed to develop" the facts in State court, and asserts that he did not "fail" to do so. Amici agree with Virginia's well-reasoned explanations of why the plain meaning of the disputed statutory language, "if the applicant has failed to develop the factual basis of a claim in State court proceedings," denotes nothing more than "if the applicant has not developed the factual basis of a claim in State court proceedings." (Resp. Br. 18-19.) Petitioner is the only party who would initiate an attack on the conviction. He is charged with the legal burden of proving sufficient grounds to set aside his conviction. And, certainly, he uniquely bears the consequences if his conviction and sentence remain in place. In this case, undeniably, petitioner did not develop the factual basis for his current claims in state court. The most natural and accurate description of these circumstances, given the onus of the consequences, is that petitioner "failed to develop" the facts. As reflected in petitioner's cited dictionary definitions, to "fail" includes "leaving . . . some possible condition unachieved." (Pet. Br. 27.) Here, the "unachieved condition" was the development of a factual basis for petitioner's claims.

Petitioner exaggerates when he says that the term "failed to develop" had a settled-meaning that Congress inferably adopted in enacting the evidentiary-hearing reform. He cites the use of the term in the *Tamayo-Reyes* case. (Pet. Br. 28 n.22.) But, although the factual context in which that case

arose was one involving apparent neglect in taking full advantage of an evidentiary hearing held in State court, this Court's opinion does not suggest that its holding would apply only in that context. Besides, in considering when a petitioner may obtain a federal evidentiary hearing, this Court earlier had decided that the entitlement depended upon whether the petitioner "deliberately bypassed" the State's processes. *Townsend v. Sain*, 372 U.S. 293, 317 (1963) (adopting *Fay v. Noia* standard). In *Tamayo-Reyes*, the Court rejected that standard in a case involving apparent negligence. The concept had hardly settled into a term of art.

In any event, as Virginia also demonstrates in its brief (Resp. Br. 17-19), petitioner's interpretation of "fail" would render meaningless and self-contradictory the specific statutory provision, in Section 2254(e)(2), for an exception to the evidentiary-hearing prohibition based upon a showing that "(A) the claim relies on . . . (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence . . . ." Under petitioner's view—that the "failed to develop" provision describes only negligent petitioners—Section 2254(e)(2) would give with one hand and take away with the other: it would offer only to the "truly negligent" petitioner an opportunity for an evidentiary hearing if he could show he had not been truly negligent. The ACLU brief glosses over the point in a footnote in its amicus brief, and honors the statutory-interpretation principle in breaching it. (ACLU Br. 11, fn. 14.) The federal court of appeals opinions cited by petitioner (Pet. Br. 26-27 n. 19) do not discuss this important point at all, and are rendered even less persuasive because of the omission.

Nor would it be harsh or unprecedented to interpret "failed to develop" as applying to a petitioner who, for whatever reason, simply did not develop the facts in state court proceedings that only he would initiate. Petitioner, it should be noted, volunteers that he would not be immune from the special evidentiary-hearing requirements described in this Court's *Tamayo-Reyes* rule, a rule similar to that of Section 2254(e)(2). While complaining that the State failed to aid and affirmatively interfered with his ability to present the facts in State court, he concedes that, in seeking a federal evidentiary hearing, he still must meet the heightened "cause and prejudice" or "miscarriage of justice" prerequisites enforced in *Tamayo-Reyes* before his constitutional claim may be heard. (Pet. Br. 37.) If that is so, there is no reason he should be immune from the similar presumptive restriction on evidentiary hearings imposed by § 2254(e)(2). This Court, indeed, has required habeas corpus petitioners to meet the "cause and prejudice" and "miscarriage of justice" standards for defaulted constitutional claims, even where the critical omission in state court proceedings was not the petitioner's doing, but the incompetence of his lawyer. E.g., *Coleman*, 501 U.S. at 752-4. The lawyer's incompetence does not establish good "cause" under this Court's precedents, unless it occurred in criminal proceedings in which the State bore a constitutional duty to provide competent counsel to the accused. See *id*. There has long been a recognition, expressed first in this Court's precedents and ratified now in the AEDPA, that some valid constitutional claims well might not be heard in federal court for procedural reasons having little or nothing to do with the interests protected by the claimed constitutional right or with factors within the petitioner's personal control.

The ACLU brief proffers what it favors as a "sensible" view of how a provision like Section 2254(e)(2) should work. (ACLU Br. 9.) The policy judgment, however, belongs exclusively to Congress, *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996); and its decision to tighten judge-made law by enacting a provision that operates in the sensible way amici States and Virginia have described cannot be second-guessed and displaced. On the question of what would have seemed sensible to Congress, a logical consideration is the likelihood that a diligent petitioner unearthing important evidence of a constitutional violation in his trial will be unable to "develop the facts" in State court proceedings in the first place. State courts provide counsel at trial and certainly in a first appeal as well. *Ross v. Moffitt*, 417 U.S. 600 (1974). Each State provides, among other protections, meaningful procedures for collateral attacks on criminal judgments, including widespread opportunities for appointment of counsel and other assistance. (Appendix.) Congress recognized that, given modern State procedures and well-founded trust in the State courts, lack of development of a factual basis for a claim fairly should be ascribed to the petitioner in the first instance. Section 2254(e)(2), therefore, treats lack of development as the petitioner's "failure." In such cases, petitioner must overcome the jurisdictional bar to a federal habeas corpus evidentiary hearing by meeting the section's explicit exceptions.

Section 2254(e)(2) Does Not Depend Upon the Federal Court Second-guessing the State Court's Rulings on Funding, Discovery, and Evidentiary Hearings

Misleading nevertheless is the suggestion (ACLU Br. 14-15), that the proper interpretation of Section 2254(e)(2) depends upon recognition that the States then have a "duty" to affirmatively aid or fund collateral attacks on their criminal judgments and that the reform provision was intended to operate only where the states discharge "responsibilities that Congress thinks they should have." As noted above, amici do not deny that the States, through their own law, voluntarily provide meaningful appellate and collateral-attack review of criminal judgments for unconstitutional errors in criminal cases. (Appendix.) And amici here agree that Congress, like this Court before it, recognized the value of the States' processes and the States' faithfulness to their constitutional duties when it accorded State proceedings its new central role in federal habeas corpus review under the AEDPA. But this Court has never said that States have a federal "duty" to provide for collateral attacks on their criminal judgments in their own courts. Cf. *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Congress' policy decision to place great trust in the states would be undermined if it were seized as an excuse for the federal courts to "peer majestically over the state court's shoulder," *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990), to re-consider whether the trust is justified and to re-evaluate, in individual cases, whether a habeas petitioner established any entitlement to state funding, state discovery, or state evidentiary hearings under applicable state law. Those judgments are exclusively the

province of the State rather than the federal courts, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and second-guess scrutiny by the federal court is the very opposite of trust. In any event, federal courts lack competence to second-guess the nuanced decisions of state courts under the varying state-by-state standards that govern state collateral proceedings.[2] Here, Section 2254(e)(2) envisions, at most, nothing more than that the doors of the State court will have been open to hear the merits of a timely-presented federal claim.

Any further suggestion that Section 2254(e)(2) depends upon federal review of the adequacy of any particular state proceeding is also undermined by the structure of the AEDPA. Where Congress meant to make a statutory benefit available to the States only if they adhered to particular guidelines—a true "incentive structure" (cf. ACLU Br. 15)—Congress spelled them out in detail and made the conditional nature of the benefit explicit. Thus, in the AEDPA's adoption of special restrictions on the writ in capital cases under Chapter 154 of the Judicial Code, §§

[2] Similarly, in the area of court-created bars against claims forfeited under state procedural law, this Court has assumed the adequacy of state time-limit and piecemeal litigation rules to support a federal bar, see, e.g., *Gray*, 518 U.S. at 161-2; *Boerckel*, 526 U.S. at ___. Although this Court inquires whether such rules are novel or enforced only irregularly, that inquiry safeguards primarily against invidious discrimination against federal claims or claimants. See, e.g., *Demorest v. City Bank Co.*, 321 U.S. 36, 42 (1944); *Rogers v. Alabama*, 192 U.S. 226, 231 (1904); see also *Howlett v. Rose*, 496 U.S. 356, 366 (1990). Here, there is no claim that Virginia's rules are *ad hoc* or pretextual in a way suggestive of improper discrimination. Nor, as argued above, does Section 2254(e)(2) contemplate any scrutiny along such lines anyway.

2261 et seq., Congress expressly set standards for the States to meet in their own proceedings in order to qualify for that Chapter's additional comity and finality protections. In contrast, Congress did not condition the operation of Section 2254(e)(2), in Chapter 153, in any similar way. If anything, Congress signaled an intent to impose the reforms in this area without regard to second-guessing the specific applications of State standards on a case-by-case basis. In the closely related provision strengthening the presumption of correctness for State court factfinding in Section 2254(e)(1), Congress deleted the earlier provisions making the presumption conditional on a State evidentiary hearing and the federal court's satisfaction with that hearing in each individual case. Cf. Former § 2254(d).

Finally, despite petitioner's claims and the assumptions in some of the federal cases he cites, an "evidentiary hearing" in either state or federal court should not be conceived as a discovery device to unearth "facts" not already alleged in the petition in the first place. The hearing should be a test of the truth of the allegations, if a test is shown to be necessary rather than merely academic, and not an expedition in search of new allegations and claims. E.g., *People v. Duvall*, 9 Cal.4th 464, 474 (1995) (court will dispose of habeas corpus petition without hearing if alleged facts, even if true, do not show prima facie case for relief); *Calderon v. United States District Court (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir. 1996) (pre-petition discovery improper as fishing expedition and as inconsistent with exhaustion doctrine); see also *Baja v. Ducharme*, 187 F.3d 1075, 1079 (9th Cir. 1999) (petitioner "failed" to first present State court with competent evidence supporting claims). It is ironic indeed that some of petitioner's cited federal court opinions,

upon expressing anachronistic suspicion of the States in deciding that § 2254(e)(2) ought not apply when the State does not afford an evidentiary hearing, themselves decline to order a federal evidentiary hearing on the prisoners' claims anyway. E.g., *Cardwell v. Green*, 152 F.3d 331, 337-8 (4th Cir. 1998); *McDonald v. Johnson*, 139 F.3d 1056, 1059-60 (5th Cir. 1998); *Burris v. Parke*, 116 F.3d 256, 259-60 (7th Cir. 1997). The idea that a federal habeas court should hold a hearing to "develop facts" would be antithetical to the exhaustion doctrine and the whole thrust of the AEDPA if that phrase connoted finding new facts, not presented to state court at least by way of corroborated allegations in a timely state habeas corpus petition.[3]

Section 2254(e)(2) Governs Claims of Suppression of Exculpatory Evidence

Petitioner claims that the State's conduct in this case went beyond mere stinginess with the public purse and state court discovery and hearing processes. He asserts, with no substantial foundation, that the State unconstitutionally withheld evidence material on the question of his guilt until it was too late for him to present it to Virginia's courts. Here, again, Virginia's brief on this topic shows that petitioner's cited evidence does not make out a case of a

[3] Although § 2254(e)(2) applies regardless of the federal court's view of whether the State affirmatively assisted the petitioner in preparing a sufficient case to trigger available State avenues of relief on his claims, amici also agree with Virginia that petitioner Williams in this case never demonstrated any basis for State assistance. See *Baja*, 187 F.3d at 1079.

constitutional violation, and that petitioner was dilatory in pursuing the claims he now says the evidence supports. (Resp. Br. 36-39, 48-49.)

It is not necessary, then, for this Court to reach any question of Section 2254(e)(2)'s operation in an instance of unconstitutional suppression of exculpatory evidence by the State. But, if the question were apt, the answer would still remain that—at least where the State contests the factual allegation—the normal operation of Section 2254(e)(2) ultimately might permit relief in such an instance, but only if the petitioner could meet the exceptions set out in subdivisions (A) and (B).

By its terms, as argued above, the provision would be triggered if, whatever the reason, the petitioner failed to develop the facts in state court. The statutory exceptions in (A) and (B) represent Congress' judgment about when such a claim merits an evidentiary hearing and possible relief. If Congress believed that unconstitutional interference by State officials amounted to a separate justification for an exception to this AEDPA habeas corpus reform, independent from an exception based on the bare unavailability of a claim to a diligent petitioner, it likely would have said so explicitly. That is what Congress did, for example, in setting out separate grounds for avoidance of the "statute of limitations" in new Section 2244(d)(1)(B, D). Petitioner and others second-guess the policy as "rewarding the State" for misconduct; but the policy choice was for Congress, which chose primarily to trust the State courts and rely on the exceptions contained in Section 2254(e)(2) as the backup federal guarantee against conviction of the innocent.

The accepted premise of this Court's own habeas corpus reforms, and those of Congress in the AEDPA, is that, at

some point, some claims by some petitioners will not be heard in federal court. Section 2254(e)(2) provides an avenue for relief for claims based upon new facts, not fairly presented to the State courts. That avenue is narrower than the one engineered in this Court's habeas corpus cases, but Congress has the right and the power to balance the competing interests—in comity, finality, federalism, fairness, accuracy, and risks to the innocent—in a different way. Congress did that generally in the AEDPA, and specifically in new Section 2254(e)(2)'s resistance to what often would be stale, albeit newly-asserted, evidence that would not promise a result more accurate than the one reached earlier, often many years earlier, at the time of trial. See *Herrera v. Collins*, 506 U.S. 390, 403-4 (1993).

No procedure is infallible. *Smith v. Robbins,* 528 U.S. ___, ___, n. 8, No. 98-1037 (January 19, 2000). The Constitution does not contemplate "rummaging" through the prosecutor's files at the time of trial. See *United States v. Robinson*, 585 F.2d 274, 281 (7th Cir. 1976) (en banc). And, under this Court's precedents, claims of unconstitutional suppression of evidence are not immune to being subjected to tougher federal-review rules if defaulted under state procedural law, *Gray*, 518 U.S. at 162, even though the petitioner might be made to bear the consequences of the incompetence of his state lawyer, see *Coleman,* 501 U.S. at 752. Section 2254(e)(2) represents Congress' considered judgment restricting federal evidentiary hearings to the rare case in which the petitioner makes sufficient showings of diligence and innocence.

In the case at bar, Section 2254(e)(2) precluded a federal evidentiary hearing unless petitioner met the statutory exceptions. As he acknowledges (Pet. Br. 25), he cannot

meet them. The Fourth Circuit was right in denying the writ without new federal factfinding.

CONCLUSION

For these reasons, the judgment of the Court of Appeals denying relief without an evidentiary hearing should be affirmed.

BILL LOCKYER
Attorney General of California
DAVID P. DRULINER
Chief Assistant Attorney General
JOHN R. GOREY
Acting Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Attorney General

APPENDIX

Alabama: Post-conviction review (Ala. Code. § 15-1-1 –15-24-34; Ala. R. Crim. P. 32.1); appointment of counsel (R. 32.7(c)("if necessary")).

Alaska: Post-conviction review (Ak. Stats. § 12-72-010); appointment of counsel (Ak. R. Crim. P. 35.1(e) ("shall be appointed" for indigent); discovery (R. 35.1(g) (generally pursuant to Ak. R. Civ. Pro. 26(b)).

Arizona: Post-conviction review (Az. R. Crim. P. 32.1); counsel (R. 32.4(c) ("shall" appoint for indigent in first petition); discovery (R. 32.3 (identifying post-conviction proceeding as part of criminal action), R. 15 (discovery available in criminal actions)).

Arkansas: Post-conviction review (Ark. R. Crim. P. 37.1); counsel (R. 37.3(b) (discretionary in non-capital cases), 37.5(b)(2) (mandatory in capital cases); discovery (R. 37.5(d) (by right in capital cases)).

California: Post-conviction review (Cal. Pen. Code §§ 1473 et seq.; Cal. Govt. Code, §§ 68660-68666 (capital case procedures); see *In re Clark*, 5 Cal.4th 750 (Cal. 1993)); counsel (*In re Saunders,* 21 Cal.4th 697, 717 n. 11 (Cal. 1997) (mandatory upon prima facie case); Cal. Govt. Code § 2265(b) (by right in capital cases)); discovery (*In re Gonzalez*, 51 Cal.3d 1179, 1258-61 (Cal. 1991) (discretionary upon prima facie case)).

Colorado: Post-conviction review (Colo. R. Crim. P. 35); counsel (Colo. Rev. Stats. Ann. § 21-1-104(1)(b)).

Connecticut: Post-conviction review (Conn. Gen. Stats. § 52-466)); counsel (§ 51-296) ("in any habeas corpus hearing"); discovery (Conn. Practice Book §§ 23-29, 23-38(a, c) (discretionary "as will enhance the fair and summary disposal of the case")).

Delaware: Post-conviction review (Superior Ct. Crim. R. 61); counsel (R. 61(e)) (discretionary, for good cause), R. 61(l)(3) (by right in capital cases); discovery (see *Dawson v. State,* 673 A.2d 1186, 1197-8 (Del. 1996) (upholding discretionary grant for "good cause," but noting no challenge made to authority under Rule 61).

***Florida*:** Post-conviction review (Fla. R. Crim. Pro. 3.850); counsel (R. 3.851(b)(3) (capital cases)); discovery (R. 3.852 (some in capital cases).

***Georgia**:* Post-conviction review (Ga. Stats. § 9-14-40 et seq.); counsel (see *Gibson v. Turpin*, 270 Ga. 855 (Ga. 1999) (no appointed counsel in habeas corpus cases, but "Resource Center" volunteer aid available in capital cases)); discovery (§ 9-14-48(a) (depositions and other discovery "upon leave of court")).

Hawaii: Post-conviction review (Ha. R. Penal P. R. 40(a)(2)); counsel (Rule 40(i) (unless petition patently frivolous); discovery (cf. R. 40(f)).

Idaho: Post-conviction review (Id. Code § 19-4901); counsel (§ 19-4904 (discretionary), § 19-2719A (apparently mandatory in capital cases); discovery (§ 19-4907(a) (civil discovery rules applicable)).

Illinois: Post-conviction review (I.L.C.S 5/122-1); counsel (§§ 122-2.1 (mandatory in capital cases), 122-4 (mandatory for non-frivolous petition in non-capital cases); discovery (*People ex rel. Daley v. Fitzgerald*, 123 Ill.2d 175 (Ill. 1988) (inherent judicial discretion to allow discovery depositions)).

Indiana: Post-conviction review (Ind. Crim. R. PC 1(1)); counsel (R. PC 1(2) (indigent referred to public defender); discovery (R. PC 1(5) (civil rules applicable)).

Iowa: Post-conviction review (Iowa Code Ann. § 822.2-822.3); counsel ("costs and expenses of legal representation shall . . . be made available"); discovery (§ 822.7 (all civil discovery available)).

Kansas: Post-conviction review (Kan. Stats. Ann. § 60-1507); counsel (§ 22-4506(b) (if "substantial issue of law or fact"); discovery (*Mebane v. State*, 21 Kan. App.2d 533 (Kan.App. 1995) (discretionary)).

Kentucky: Post-conviction review (Ky. Rev. Stats. § 419.020; Ky. R. Crim. P. 10.02, 11.42); counsel (R. 11.42(5) (if motion raises material fact)).

***Louisiana**:* Post-conviction review (La. Code Crim. P., arts. 924, 930)); counsel (art. 930.7 (discretionary)); discovery (art. 929, 930.7(B) (good cause)).

Maine: Post-conviction review (Maine Rev. Stats. Ann. §§ 2122, 2125); counsel (see § 2129(B) (for indigent)); *McEachern v. State*, 456 A.2d 886 (1983) (discretionary appointment "typically necessary" if petition not summarily dismissed)).

Maryland: Post-conviction review (Md. Code Ann., art. 27, § 645A); counsel (§ 645(A)(f)(1, 2)); Md. Rule 4-406 (entitlement on first petition, discretionary on reopening of prior petition)).

Massachusetts: Post-conviction review (Mass. R. Crim. Pro. 30(a)); counsel (R. 30(c)(5) (discretionary); discovery (R. 30(c)(4) (if prima facie case shown)).

Michigan: Post-conviction review (Mich. R. Crim. Pro. 6.502); counsel (R. 6.505A (discretionary, but mandatory for evidentiary hearing or oral argument); discovery (R. 6.508(A) (civil rules available)).

Minnesota: Post-conviction review (Minn. Stats. Ann. § 590.01); counsel (§ 590.05) (public defender may represent indigent); discovery (see § 590.04(3) (contemplating depositions)).

Mississippi: Post-conviction review (Miss. Stats. §§ 99-39-1, 99-39-5); counsel (§ 99-39-23(1) (discretionary in case of evidentiary hearing)); discovery (§ 99-39-15(1), 23(3) (good cause)).

Missouri: Post-conviction review (Mo. Supreme Ct. R. 29.15); counsel (R. 24.035(a), 24.036(a), 29.15(a); Mo. Rev. Stats. Ch. 600 (public defender); discovery (civil rules).

Montana: Post-conviction review: (Mont. Code. Ann. § 46-21-101); counsel (§ 46-21-201(2, 3) mandatory in capital cases; court shall appoint in non-capital case if hearing needed or if required by interests of justice)); discovery (§ 46-21-201(4) (for good cause)).

Nebraska: Post-conviction review (Neb. Rev. Stats. § 29-3001); counsel (§ 29-3004) (may appoint two)).

Nevada: Post-conviction review (Nev. Rev. Stats. § 34.724); counsel (§ 34.750(1) (discretionary if non-capital petition not summarily dismissed), § 34.820 (by right in capital cases)); discovery (§ 34.780) (civil discovery rules applicable)).

New Hampshire: Post-conviction review (N.H. Rev. Stats. Ann. 534:1).

New Jersey: Post-conviction review (N.J. R. Crim. P. 3:22-(1-3)); counsel (R. 3:22-6) (public defender for indigent); discovery (see *State v. Marshall*, 148 N.J. 89, 267 (N.J. 1997) (extending to post-conviction case rule that "courts have 'inherent power to order discovery when justice so requires'")).

New Mexico: Post-conviction review (N.M. Stats. Ann. § 31-11-6); counsel (§ 31-11-6(b) (mandatory unless motion conclusively shows no merit).

New York: Post-conviction review (N.Y. Crim. P. Law §§ 440.10, 440.20, 440.30); counsel (N.Y. Jud. Law § 35-b (by right in capital cases)).

North Carolina: Post-conviction review (N.C. Gen. Stats. § 15A-1414, 1415); counsel (§ 451(c) (two counsel by right for indigent capital petitioner), § 7A-451(a)(3) (counsel by right in non-capital cases)); discovery (§ 15A-1415(f) (access to complete law enforcement and prosecutorial files in capital cases; see § 7A-450(b); *State v. Tatum*, 291 N.C. 73 (1976) (indigent petitioners entitled to investigator as part of "necessary expenses of representation")).

North Dakota: Post-conviction review (N. Dak. Cent. C. § 29-32.1-01); counsel (§ 29-32.1-05 ("shall appoint" for indigent); discovery (§ 29-32.1-08) (for good cause)).

Ohio: Post-conviction review (Ohio Rev. Code, § 2953.21); counsel (Ohio Rev. Code § 2953.21 (capital cases); *State v. Crowder*, 573 N.E.2d 652 (1991) (public defender may represent petitioner in non-capital cases if issues have arguable merit).

Oklahoma: Post-conviction review (Ok. Stats., tit. 22, ch. 18, §§ 1080 et seq. (all cases), § 1089 (capital cases)); Ok. R. Ct. Crim. App. 9.7 (capital cases); counsel (§§ 1082 ("if necessary," non-capital cases), 1089(B) (indigent defender appointment by right in capital case)); discovery (§ 1089(D)(3) (capital cases); see § 1088.1(a)(3)(non-capital cases)(contemplating "discovery")).

Oregon: Post-conviction review (Ore. Rev. Stats. § 138.510); counsel (§ 138.590(1-4) (mandatory for indigent).

Pennsylvania: Post-conviction review (42 Pa. Consol. Stats. Ann.§§ 9541 et seq.; Pa. R. Crim. P. 1500 et seq.); counsel (R. 1504(a) (by right for indigent's first petition)); discovery (R. 1502(e)(1) (leave of court, for "exceptional circumstances" (non-capital cases), R. 1502(e)(2) (leave of court for "good cause" (first counseled capital petition)).

Rhode Island: Post-conviction review (R.I. Gen. Laws 10-9.1 et seq.); counsel (§ 10-9.1-5 (by right for indigent); discovery (§ 10-9.1-7 (civil discovery rules applicable)).

South Carolina: Post-conviction review (S.C. Code Ann. (1976) § 17-27-(10, 20)); counsel (§ 17-27-60; S.C. R. Civ. P. 71.1(d)) (mandatory for indigent and if hearing required), § 17-27-160 (two counsel by right in capital cases); discovery (§ 17-27-150 (civil rules discovery available in non-capital cases in court's discretion for good cause; civil discovery available by right in capital cases)).

South Dakota: Post-conviction review (S.D. Codified Laws § 21-27-1); counsel (§ 21-27-4 (by right)); see § 15-6-26(a) (civil discovery rules); *Reutter v. Meierhenry*, 405 N.W.2d 627, 629 (1987) (civil rules generally applicable in habeas corpus cases)).

Tennessee: Post-conviction review (Tenn. Stats. §§ 40-30-202, 40-30-207, 40-26-105, 29-21-101); counsel (§ 40-30-(206(e), 207) (by right for indigent)); discovery (§ 40-30-209 (pursuant to Tenn. Rules Crim. Pro. 16)).

Texas: Post-conviction review (Tex. Ann. Code of Crim. P. (Vernon's) § 11.070 et seq.); counsel (§ 11.071(c)) (by right in capital cases)); discovery (see § 11.07(d) (permitting interrogatories and depositions)).

Utah: Post-conviction review (Ut. Code Ann. § 77-35a-101 et seq.); counsel (§§ 78-35a-109 (discretionary, if motion in non-capital case not summarily dismissed),

§ 78-35a-202 (by right in capital case)); discovery (Ut. R. of Crim. P. 65C(l) (good cause).

Vermont: Post-conviction review (Vt. Stats. Ann. §§ 3952, 7132-3); counsel (§ 7137) (discretionary).

Virginia: Post-conviction review (Va. Code §§ 8.01.654); counsel (§ 19.2-163.7 (capital cases), see *Darnell v Peyton*, 160 S.E.2d 749 (1968) (entitlement for substantial or triable issues); discovery (Va. Sup. Ct. R. 4:1(b)(5) (leave of court in capital cases)).

Washington: Post-conviction review (Wash. Rev. Code § 4-76.080, 10-73.090); counsel (§ 10-73.150) (by right in capital cases, and if non-capital petition is not frivolous); discovery (*In re Gentry,* 137 Wash.2d 376, 391 (Wash. 1999) (if substantial likelihood discovery will lead to relief)).

West Virginia: Post-conviction review (W.Va. Code § 53-4A-1); counsel (§ 53-4A-4).

Wisconsin: Post-conviction review (Wis. Stats. Ann. § 782.01, 974.06); counsel (§ 974.06(3) (by public defender, if necessary). discovery (*State v. O'Brien*, 223 Wisc. 303, 323 (1999) (if relevant to issue presenting reasonable probability of different result)).

Wyoming: Post-conviction review (Wyo. Stats. § 7-14-101); discovery (§ 7-14-101(c) (civil discovery rules applicable)).